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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

COASTAL STEEL CORPORATION,

Petitioner,

vs.

WHEELABRATOR-FRYE, INC. and
TILGHMAN WHEELABRATOR LIMITED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented

1. Whether the Bankruptcy Reform Act sets forth a public policy which precludes the enforcement of a contractual forum selection clause providing for an English forum.

2. Whether the Bankruptcy Court and District Court properly exercised their discretion in determining that enforcement of a contractual forum selection clause was unreasonable under the circumstances based on (a) status of the plaintiff as third party beneficiary, (b) presence of colorable non-contractual tort claims, (c) need to view machinery in New Jersey, and (d) recovery for bankrupcty creditors.

3. Whether the jurisdiction of the Court of Appeals pursuant to the *Enelow-Ettelson* rule extends to an appeal from the denial of a motion to dismiss a complaint on the basis of a contractual forum selection clause.

4. Whether the jurisdiction of the Court of Appeals pursuant to the collateral order doctrine extends to an appeal from the denial of a motion to dismiss a complaint on the basis of a contractual forum selection clause.

5. Whether 28 U.S.C. §2105 prohibits review by a Court of Appeals of a denial of a motion to dismiss a complaint on the basis of a contractual forum selection clause.

6. Whether a writ of mandamus, 28 U.S.C. §1651, is properly the basis for review by the Court of Appeals of a denial of a motion to dismiss a complaint on the basis of a contractual forum selection clause.

7. Whether finality under *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964) extends to a appeal from a denial of a motion to dismiss a complaint on the basis of a contractual forum selection clause.

8. Whether 28 U.S.C. §1293(b), which provides for Bankruptcy appellate jurisdiction of the Court of Appeals is repealed by implication as a result of *Northern Pipeline Co.* v. *Marathon Pipeline Co.*, —— U.S. ——, 102 S.Ct. 2858, 79 L.Ed.2d 598 (1982).

9. Whether *Northern Pipeline Co.* v. *Marathon Pipeline Co., supra* may be applied retroactively to invalidate Bankruptcy Court Orders.

Parties

All the parties to the Appeal are set forth in the caption.

Petitioner Coastal Steel Corporation hereby sets forth its original designation of corporate relationships. It is not owned by any parent corporation and has no ownership interest in any subsidiaries. It has an affiliate, Blair Realty, a limited partnership.

Dated: September 7, 1983

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NO.

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COASTAL STEEL CORPORATION,

Petitioner,

v.

WHEELABRATOR-FRYE, INC. and
TILGHMAN WHEELABRATOR LIMITED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Coastal Steel Corporation petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

Opinion Below

The opinion of the Court of Appeals (App. A *infra*, 1a) is reported at 709 F.2d 190. The petition for rehearing in banc was denied on June 14, 1983, (App. C *infra*, 51a).

The decisions of the United States District Court and Bankruptcy Court are unreported. The transcript of the oral opinion of the Bankruptcy Court is set forth at App. D, *infra,* 53a. The written opinion of the District Court granting leave to appeal is set forth at App. E, *infra,* 65a. Transcripts of the two oral opinions of the District Court are set forth at App. F, *infra,* 71a and App. G *infra,* 82a.

Jurisdiction

The judgment of the Court of Appeals (App. B, *infra,* 49a) was entered on May 17, 1983. A timely petition for rehearing was filed on May 31, 1983 and was denied on June 14, 1983 (App. C, 51a). The mandate was stayed pending the petition on June 17, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statutes Involved

This petition involves the interpretation of the following statutes: 28 U.S.C. §1291; 28 U.S.C. §1292(a)(1); 28 U.S.C. §1293(b); 28 U.S.C. §1471; 28 U.S.C. §1651; and 28 U.S.C. §2105.

The statutes are set forth in the appendix.

Statement of the Case

Petitioner Coastal Steel Corporation, a New Jersey Corporation ("Coastal"), filed a Chapter 11 petition for a reorganization in Bankruptcy on April 11, 1980. On July 14, 1980, it filed a Complaint in Bankruptcy Court against, *inter alia,* respondents Tilghman Wheelabrator Limited

("Tilghman"), an English corporation, Wheelabrator-Frye, Inc., ("Wheelabrator"), its American parent corporation, and Sir James Farmer Norton, Ltd. ("Norton") an English corporation, seeking specific performance, rescission, damages for breach of contract, as well as damages arising in tort. The basis for federal jurisdiction in Bankruptcy Court was 28 U.S.C. §1471.

In 1976, Coastal, then known as Jersey Cold Drawn Steel, a manufacturer of cold drawn steel bar, commenced negotiations with Norton for the acquisition of an in-line turnkey steel plant to be erected in New Jersey. A major component of the plant was a blast cleaning unit to be manufactured by St. Georges Engineers Ltd., ("St. Georges") an English company. The proposal and purchase order between St. Georges and Norton did not provide for any forum selection clause. Coastal and Norton executed the main contract in November, 1976. That agreement provided for arbitration of disputes in New Jersey. A month later, unknown to Coastal, Tilghman, which had since acquired St. Georges, renegotiated the blast cleaning component contract for a lesser price and substituted a different machine which was designed for a different application. That renegotiated contract provided for performance specifications and an English forum for resolution of disputes.

After delivery and erection of the components, Wheelabrator, the parent of Tilghman, was engaged by Tilghman to commission the blast cleaning plant in New Jersey. It became apparent that the blast cleaning component failed to meet the specifications required under the contract, and Wheelabrator turned the commissioning back to Tilghman. Wheelabrator and Tilghman then attempted to make modifications to the blast cleaning machine but were unsuccessful, and the machine was never able to perform to the contract specifications.

Thereafter, suit was commenced on July 14, 1980, which was followed by extensive discovery. Tilghman moved to dismiss the Complaint on the grounds of forum non conveniens and the contractual forum selection clause. The Bankruptcy Court denied the motion by oral opinion of September 21, 1981 (App. D) and Order dated November 9, 1981. Tilghman and Wheelabrator (not a party to the motion) filed an interlocutory appeal to the United States District Court which granted the leave to appeal to Tilghman only, by written Opinion (App. E) and Order dated January 27, 1982. By Oral Opinion dated May 3, 1982, (App. F) and Order dated May 28, 1982, the District Court dismissed Wheelabrator as an appellant and affirmed the Bankruptcy Court. Both Tilghman and Wheelabrator filed a motion for certification pursuant to 28 U.S.C. §1292(b) which was denied by oral decision of the District Court on June 21, 1983 (App. C) and Order dated June 25, 1982. Both Tilghman and Wheelabrator filed a Notice of Appeal with the Court of Appeals on June 25, 1982. Coastal moved to dismiss for lack of appellate jurisdiction.

By decision dated May 17, 1983 the Court of Appeals reversed the decisions of the District Court and Bankruptcy Court, and held that 28 U.S.C. §1293(b) as a basis for appellate jurisdiction, was repealed by implication as a result of *Marathon,* and that the Order was appealable alternatively (a) pursuant to 28 U.S.C. §1292(a)(1) under the *Enelow-Ettelson* rule, (b) as a final order pursuant to 28 U.S.C. §1291 under the "collateral order rule"; and (c) by mandamus. The concurring opinion was essentially a dissent on the issue of jurisdiction, concluding that the Order properly lay within the "twilight zone of finality" and was appealable only under *Gillespie* v. *United States Steel Corp.,* 379 U.S. 148 (1964). As to the merits, both the majority and concurring opinions concluded that (a) there was no bankruptcy policy precluding enforcement of

the contractual forum selection clause, (b) the factors considered by the trial court (i.e., the Bankruptcy Court) and the District Court in denying enforcement of the forum selection clause were improper.

Reasons for Granting the Writ

The Court of Appeals, reversing both the Bankruptcy Court and the District Court, concluded that a contractual forum selection clause is absolutely enforceable in a Bankruptcy Court, notwithstanding the conflicting public policy embodied in the broad grant of jurisdiction under 28 U.S.C. §1471, now exercised by District Courts. In addition to the public policy grounds for not enforcing the forum selection clause, both the Bankruptcy Court and District Court had found that enforcement of the clause would be unreasonable because (1) the forum selection clause was in a third party contract not negotiated or known to exist by Coastal, (2) there were colorable non-contractual tort claims, (3)the need to view the machinery in New Jersey was significant; and (4) the creditors in Bankruptcy had an interest in maintaining the action in New Jersey. The Court of Appeals rejected these factors and improperly substituted its own subjective judgment as to the standard by which enforcement of contracts forum selection clause is unreasonable.

In reaching the merits, the Court of Appeals announced a new rule for appellate jurisdiction unsupported by statutory authority or case law, to wit that 28 U.S.C. §1293 (b), which provides for bankruptcy appeals, was repealed by implication as a result of the *Marathon* decision. The Court of Appeals also substituted several alternative bases for appellate jurisdiction, all improperly applied, which effectively destroy the integrity of the appellate process: (1)

The *Enelow-Ettelson* rule, (permitting an appeal from a motion for a *stay*, which is deemed tantamount to an appeal from an injunction), was extended to a motion to *dismiss* a complaint. (2) The collateral order doctrine was applied to an appeal from an Order enmeshed in the merits of a case, i.e., the unreasonableness of enforcement. (3) The collateral order rule was further supported by a novel application of 28 U.S.C. §2105 to limit the jurisdiction of appellate courts. (4) Mandamus was invoked to review an exercise of discretion. (5) The extraordinary remedy of *Gillespie* was utilized to review an exercise of discretion.

Review by this Court is necessary to correct an erroneous decision on the enforceability of a contractual forum selection clause, and to correct a bizarre and highly improper construction of appellate jurisdiction which fundamentally alters the bases for bankruptcy and nonbankruptcy appeals.

I. The Court of Appeals erroneously held the contractual forum selection clause to be enforceable.

The Court of Appeals erroneously held that the Bankruptcy Reform Act was not imbued with a strong public policy which would preclude enforcement of a forum selection clause under *Bremen* v. *Zapata Offshore Co.*, 407 U.S. 1 (1972). In fact, the purpose of the Bankruptcy Reform Act was to invest the Bankruptcy Court and the District Court pursuant to §1471(b) with the most comprehensive and pervasive jurisdictional grant and to resolve all matters in one forum. 1 Collier, *Bankrupcty* (15th Ed.) ¶ 3.01. The legislative history itself states that §1471 was intended to "leave no doubt as to the scope of the bankruptcy court's jurisdiction over disputes." H.Rep. 595, 95th Cong. pp. 445-446. The Bankruptcy policy is no less significant then

the policy underlying the Federal Employee Liability Act in *Boyd* v. *Grand Trunk W. R. Co.*, 228 U.S. 263 (1949), which was cited in the *Bremen* case. See *Zimmerman* v. *Continental Airlines, Inc.*, —— F.2d —— (No. 82-1639, 7/11/83, 3d Cir.) holding that the Bankruptcy Reform Act modifies the Arbitration Act. It is not merely Coastal Steel Corporation which resists enforcement, but a debtor-in-possession which is a different entity, and which acts not only on its behalf but also on behalf of general unsecured creditors. *See, L.O. Koven & Bros., Inc. Local U. No. 5767*, 381 F.2d 196, 203 (3d Cir. 1967).

Further, the trial court and District Court properly considered the factors as to whether enforcement of a forum selection clause would be unreasonable and unjust under the *Bremen* standard: (1) Coastal Steel did not bargain for the forum selection clause and, indeed, did not know of its existence. Its Complaint against Tilghman as a third party beneficiary was premised on a contract between St. Georges and Norton which Coastal believed was still in effect. Coastal did not know that Tilghman had acquired St. Georges and further that subsequent to execution of Coastal's contract with Norton, Coastal did not know that Tilghman had secretly negotiated a new contract to include a forum selection clause. Indeed, English law does not even recognize a cause of action based on a third party beneficiary. (2) The secret renegotiation and secret replacement of an inferior machine designed for a completely different application gave rise to colorable tort claims independent of contract and not limited by a forum selection clause. (3) The need for an expert and possibly the Court to examine and review the machine in New Jersey was essential. (4) The interest of creditors to be paid their claims from the bankruptcy estate and from this litigation was significant. Creditors will share in a recovery, which would be significantly reduced by the additional expense of

litigation in England. The Court of Appeals lightly dismissed this as a "Robin Hood quality." (27a).

These factors were properly considered by the District Court and trial court under the *Bremen* standard. The Court of Appeals improperly rejected *Bremen* and relied upon a discretionary subjective and *sui generis* review process as to the enforcement of a forum selection clause, substituting its own judgment for that of the Bankruptcy Court and District Court.

II. The decision of the Court of Appeals as to the basis for appellate jurisdiction is in conflict with statutory authority, and with decisions of the United States Supreme Court and courts of appeals for other Circuits.

A. The decision of the Court of Appeals repealing 28 U.S.C. §1292(b), and applying *Marathon* retroactively was erroneous and in conflict with other circuits.

Section 1293(b) has been uniformly recognized in other circuits as barring interlocutory appeals. See e.g., *Maiorino* v. *Branford Sav. Bank*, 691 F.2d 89 (2d Cir. 1982), *Matter of International Horizons, Inc.*, 689 F.2d 996 (11th Cir. 1982). The Court of Appeals below not only rejected those decisions but held *Section 1293 (b) to be repealed by implication* as a result of the opinion of the United States Supreme Court in *Marathon*, reasoning that since *all* bankruptcy orders will only be effective if signed by a District Court Judge, under the Emergency Rule adopted by New Jersey as Local Rule 47, the need for a special bankruptcy appellate statute is eliminated.

Further, the Court of Appeals below held that *Marathon* could be *selectively* applied retroactively where appropri-

ate to invalidate a Bankruptcy Court judgment filed prior to December 24, 1982. The Court of Appeals thus expressly contravened the retroactivity limitation in *Marathon*, and repealed Section 1293(b), substituting a new basis for appellate jurisdiction of bankruptcy appeals.

This bizarre decision turns all similar bankruptcy appeals on end, and effectively invalidates all Bankruptcy Court Orders rendered both before and after *Marathon*. It is for Congress to determine whether Section 1293(b) should be repealed or whether it should remain the sole repository of bankruptcy appellate jurisdiction. Review by the Supreme Court is compelled because of the Supreme Court's own position in *Marathon* and because of the conflicts in the circuits as to the meaning and very existence of Section 1293(b).

B. The decision of the Court of Appeals erroneously extended by analogy the Enelow-Ettelson rule to dismissal of a complaint based on a forum selection clause.

The *Enelow-Ettelson* rule (*Enelow* v. *New York Life Insurance Co.*, 293 U.S. 379 (1935) and *Ettelson* v. *Metropolitan Life Ins. Co.*, 317 U.S. 188 (1942) recognized the existence of a legal fiction as tantamount to an appeal from a request for injunction under 28 U.S.C. §1292(a)(1). The fiction requires the equivalent of a request to *stay* an action at law pending an action for equitable relief in a court of equity. An example is a stay pending arbitration, *Shanferoke Coal & Supply Corp.* v. *Westchester*, 293 U.S. 449 (1935).

The Supreme Court in *Morgantown* v. *Royal Ins. Co.*, 377 U.S. 254 (1945) held, however, that the legal fiction should not be extended by analogy. The Court of Appeals in *Coastal Steel* did extend the fiction, by analogy, from a

stay pending arbitration to a denial of a motion to dismiss a Complaint on the basis of a contractual forum selection clause. Further, the rule was erroneously applied to a *dismissal* rather than merely a *stay*, thus extending the rule beyond the fiction which created it. This new basis for appellate jurisdiction is contrary to the limitations established by the Supreme Court.

C. The Court of Appeals misapplied the collateral order rule by reviewing an order enmeshed in the merits.

Finality under 28 U.S.C. §1291 is articulated under a three part test in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 567 (1978), each of which must be satisfied. One part of the test is that the Order must not require a consideration of the merits of the underlying litigation. The enforcement of the forum selection clause under *Bremen* v. *Zapata Offshore Co.*, 407 U.S. 1 (1972) requires the trial court to make a determination of whether enforcement would be *unreasonable* under the *circumstances*, which necessarily requires the court to plunge into the probative evidence, potential hardship, materiality of testimony and inspection of the blast equipment. The decision of the Court of Appeals thus extends the collateral order doctrine beyond its established guidelines and into a new basis for appellate jurisdiction under which all orders relating to a change of venue would be appealable as of right.

D. The Court of Appeals improperly entended 28 U.S.C. §2105 as a limitation of appellate jurisdiction.

As a further basis for finding finality under the collateral order doctrine, the Court of Appeals determined that the order denying a motion to dismiss a complaint

based on a forum selection clause was not reviewable on appeal because of 28 U.S.C. §2105, which provides that there "shall be no reversal in . . . a Court of Appeals for error in rulings upon matters in abatement which do not involve jurisdiction." The Court of Appeals thereby concluded that the third test of the collateral order rule, i.e., the order could not be adequately reviewed after trial, was met.

This novel interpretation of 28 U.S.C. §2105 introduces a new limitation on appellate jurisdiction which would bar all review, not only of orders concerning a forum selection clause, but also a stay pending arbitration, forum non conveniens, and venue transfer actions. Such a drastic limitation on jurisdiction should be reviewed by the United States Supreme Court.

Further, by its own terms, Section 2105 prohibits appellate review of the within appeal by the Court of Appeals under the collateral order doctrine as well as after trial.

E. Review by Mandamus was improperly exercised by the Court of Appeals.

The Supreme Court has held that mandamus pursuant to 28 U.S.C. §1651 is not appropriate to review the exercise of discretion by the trial court, *Will* v. *Calvert Fire Ins. Co.*, 437 U.S. 665 (1978). The Bankruptcy Court and District Court below did exercise their discretion and did weigh various factors in determining whether enforcement of the forum selection clause was unjust or unreasonable. Mandamus should not have been utilized as a "catch-all" when other bases for appellate jurisdiction failed. The effect of the decision by the Court of Appeals is to improperly expand the use of the All Writs statute in lieu of an appeal. This result is erroneous, contrary to the cases, and should be reviewed by the Supreme Court.

F. Review under *Gillespie* was improper.

The concurring opinion determined that the appeal lay in the "twilight zone of finality" and thus appellate jurisdiction came within *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964). This extraordinary remedy is appropriate only when the danger of denying justice by delay outweighs the prohibition of piecemeal review.

The only delay here would be a trial on the merits. The case is ripe for pre-trial and trial since all discovery is complete. The pre-trial has been delayed only because of the pendency of the appeal. The appeal on the enforcement of the forum selection clause should be raised after trial together with all other interlocutory matters. The decision of the Court of Appeals has raised *Gillespie* from an extraordinary remedy to a new basis for appeal which is readily applicable to every interlocutory appeal from an order relating to discovery, a forum selection clause, forum non conveniens, change of venue, stay pending arbitration, or stay or dismissal pending administrative action. There is no distinction between interlocutory appeals from any of those actions and the within appeal. *Gillespie* has thus been improperly broadened and expanded into a broad discretionary basis for appellate jurisdiction.

CONCLUSION

The Court should review this case because of the public importance in resolving the conflict between public policy under the Bankruptcy Reform Act and a contractual forum selection clause, as well as determining the standards for refusal to enforce the clause. Further, insofar as the Court of Appeals found a basis for appellate jurisdiction, it created a dangerous and bizarre precedent undermining the statutory appellate jurisdiction and decisions to the contrary by this Court and other Circuits.

Respectfully submitted,

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Dated: September 7, 1983

[APPENDICES FOLLOW]

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5391

COASTAL STEEL CORPORATION,
a Corporation of the State of New Jersey

v.

TILGHMAN WHEELABRATOR LTD. and
WHEELABRATOR-FRYE INC.

Wheelabrator-Frye Inc. and
Tilghman Wheelabrator Limited,
Appellants

(D.C. Civil No. 82-412)

Hon. Harold A. Ackerman, *District Judge*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued: February 14, 1983

Before: GIBBONS, HUNTER and ROSENN, *Circuit Judges*

(Opinion Filed: May 17, 1983)

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Appendix A

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OPINION OF THE COURT

GIBBONS, *Circuit Judge.*

Wheelabrator-Frye, Inc. (Wheelabrator) and Tilghman Wheelabrator Limited (Tilghman) seek appellate review of orders of the district court in a proceeding under 28 U.S.C. §1334(b) (Supp. V 1981), which is in effect during the transition period under the Bankruptcy Code. Pub. L. No. 95-598, tit. IV, §405, 92 Stat. 2686 (printed in note preceding 28 U.S.C. §1471 (Supp. V 1981). Wheelabrator seeks review of an order denying it leave to appeal from an order of the bankruptcy court. Tilghman seeks review of an order affirming the order of the bankruptcy court, which denied its motion to dismiss a civil proceeding against it related to a case under Title 11. *See* 28 U.S.C. §1471(b) (Supp. V 1981), which is in effect during the transition period under the Bankruptcy Code. Pub. L. No. 95-598, tit. IV, §405, 92 Stat. 2686 (printed in note preceding 28 U.S.C. §1471 (Supp. V 1981). Tilghman's motion asserted (1) that the contract on which its liability, if any, is predicated contains a forum selection clause which should be enforced, and (2) that the bankruptcy court is an inconvenient forum. The plaintiff in the Section 1471(b) action is the debtor, Coastal Steel Corporation (Coastal). It contends that we

lack jurisdiction to review either order, but should such jurisdiction exist, both orders should be affirmed. Assuming we have jurisdiction to review either order under any of the statutory provisions defining our reviewing authority, we must also consider whether in light of the decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, ____ U.S. ____, 102 S.Ct. 2858 (1982), there is subject matter jurisdiction over the dispute in any federal court.

I.

On November 9, 1976 Coastal, a steel fabricator with its principal place of business in New Jersey, contracted with Sir James Farmer Norton & Co., Ltd. (Farmer Norton), a British corporation, for an in-line steel working plant in turn-key condition ready for commercial production of cold-drawn steel bar in accordance with contract specifications. The Coastal-Farmer Norton contract contained a provision that any dispute between the parties would be settled by arbitration "where the property in contest is located." The plant was to be erected in New Jersey.

One component of the plant was a bar cleaning machine or blast unit. The contract did not specify the supplier of the blast unit, but prior to the execution of the agreement Coastal had suggested to Farmer Norton that it investigate such a unit manufactured by a British firm called St. Georges Engineers, Ltd. (St. Georges). In June of 1976 St. Georges submitted to Farmer Norton a quotation on a blast unit. Shortly after St. Georges submitted the quotation, it was acquired by Tilghman, a British corporation and a subsidiary of Wheelabrator-Frye, Inc. On November 26, 1976, several weeks after the execution of the Coastal-Farmer Norton contract, Tilghman informed Farmer Norton that St. Georges had seriously miscalculated the cost of the blast unit on which it quoted. Tilghman and Farmer Norton then contracted

for a Tilghman blast unit at a price of $176,000, which was higher than St. Georges' original quotation but lower than Tilghman's revised cost estimate. The Tilghman-Farmer Norton contract provided that the blast unit would be built in England and delivered there to Farmer Norton. It also provided:

> 15. These conditions shall be construed in accordance with English law. In the event of any dispute arising the same shall be determined by the English Courts of Law.

Although delivery was made to Farmer Norton in England, Tilghman undertook to supervise the commissioning of the blast unit after its installation in Coastal's New Jersey plant. Tilghman arranged for its American parent company, Wheelabrator of Mishawaka, Indiana, to supervise the commissioning. In late 1979 Tilghman also sent a representative to New Jersey to make modifications on the blast unit.

On April 11, 1980, Coastal filed a petition for reorganization under Chapter 11 of the Bankruptcy Code. In July of 1980 the debtor filed in the bankruptcy court a complaint against Farmer Norton, Tilghman, Wheelabrator, and Charterhouse Japhet Export Finance Company (Charterhouse), an English firm which financed Coastal's purchase from Farmer Norton. Farmer Norton never appeared and has gone bankrupt. Coastal settled with and dismissed its complaint against Charterhouse. Against Tilghman and Wheelabrator its complaint seeks recovery of over $4 million in consequential damages resulting from alleged defects in the Tilghman supplied blast unit.

Tilghman and Wheelabrator appeared and filed answers denying the material allegations of the complaint. They also moved to dismiss. The bankruptcy court denied the motion to dismiss without prejudice to its renewal after further discovery. After fairly extensive discovery, including depositions initiated by Coastal of

various witnesses in England, Tilghman again moved to dismiss, relying both on the forum selection clause in the Tilghman-Farmer Norton contract and on the *forum non conveniens* doctrine. Wheelabrator joined in the motion in a reply brief. The bankruptcy court denied the Tilghman motion by an order dated November 9, 1981.

Both Tilghman and Wheelabrator applied to the district court, pursuant to 28 U.S.C. §1334(b), for leave to appeal. The court granted such leave on January 27, 1982, but only as to Tilghman. On May 27, 1982 the district court granted Coastal's motion to dismiss Wheelabrator as an appellant and affirmed the order denying Tilghman's motions, for reasons which we address in Part IV.B *infra*. Tilghman and Wheelabrator moved the district court to certify, pursuant to 28 U.S.C. §1292(b) (1976), that its order involved a controlling question of law as to which there is a substantial ground for a difference of an opinion and that an immediate appeal might materially advance the ultimate termination of the litigation. The district court denied that motion. Tilghman and Wheelabrator have both appealed.

II.

Tilghman and Wheelabrator originally relied, for appellate jurisdiction, on 28 U.S.C. §1291. The parties and this court recognized, however, that the less than clear provisions of Pub. L. No. 95-598, §§236-41, 405, 92 Stat. 2667-71, 2685 (1978), respecting appealability of orders in civil proceedings related to cases under Title 11, require this court to consider all possible sources of its authority in this court to review the orders in question. Coastal contends that they are entirely unreviewable, while Tilghman and Wheelabrator urge that Congress could not have intended to foreclose review of orders denying enforcement of forum selection clauses or compelling litigation in inconvenient forums. The *Northern Pipeline* decision presents a further complication, for it

is now clear that the bankruptcy court, the order of which the district court affirmed, does not have jurisdiction over Coastal's action against Tilghman and Wheelabrator. If the district court has such jurisdiction, as Local Rule 47(C)(3) of the District Court for the District of New Jersey appears to assume, we must consider whether our jurisdiction under 28 U.S.C. §§1651, 1291 or 1292 applies, or whether 28 U.S.C. §1293 or 28 U.S.C. §1471(d) governs. The problem is not a simple one.

A.

If the case had been before the district court as a section 1332 federal question or a section 1331 diversity case, we would have jurisdiction under section 1292(a)(1). A motion to dismiss an action in order to give effect to a forum selection clause is in practical effect an application for specific performance of that contractual provision. It is analytically indistinguishable from a motion to stay an action at law pending arbitration. Grants or denials of such orders are reviewable under section 1292(a)(1). *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U.S. 449 (1935); *Gavlik Construction Co. v. H.F. Campbell Co.*, 526 F.2d 777 (3d Cir. 1975); *Merritt-Chapman & Scott Corp. v. Pennsylvania Turnpike Comm.*, 387 F.2d 768 (3d Cir. 1967). Deferrals to non-arbitral tribunals have been treated similarly. *In re Unterweser Reederei G.M.B.H.*, 428 F.2d 888 (5th Cir. 1970), *aff'd en banc*, 446 F.2d 907 (5th Cir. 1971), *vacated on other grounds sub nom. The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *Alberto-Culver Company v. Scherk*, 484 F.2d 611 (7th Cir. 1973), *rev'd on other grounds, Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974). *The Bremen* and *Scherk* are the Supreme Court's definitive modern pronouncements on the enforceability of contractual forum selection clauses. In

each case the Supreme Court's appellate jurisdiction was, under 28 U.S.C. §1254, derivative of the jurisdiction of the court of appeals, and in each case that jurisdiction was predicated on section 1292(a)(1).

Coastal contends that because some of the relief requested was equitable rather than legal, *the Enelow-Ettelson*[1] rule does not apply. We note that in *The Bremen* the underlying suit was in admiralty and that in *Scherk* both legal and equitable relief was requested. Thus it may well be that for purposes of reviewing interlocutory decisions on enforceability of forum selection clauses pursuant to section 1292(a)(1), the Supreme Court no longer recognizes the artificial *Enelow-Ettelson* distinction. *But see Cotler v. Inter-County Orthopaedic Ass'n*, 526 F.2d 537, 540-41 (3d Cir. 1975); *Rodgers v. United States Steel Corp.*, 508 F.2d 152, 160 (3d Cir.), *cert. denied*, 423 U.S. 832 (1975). In any event, we have examined the pleadings, and we conclude that whether on a contract or a tort theory, what Coastal seeks is money damages for the alleged malfunctioning of a machine. This is classic legal relief. Thus the appeal falls within the classic *Enelow-Ettelson* formulation, assuming section 1292(a)(1) applies to proceedings relating to bankruptcy.

B.

Tilghman and Wheelabrator also urge that the orders are in any event appealable under section 1291 as collaterally final. Appellate jurisdiction, even in a section 1331 or section 1332 case, is on this theory more problematical. Section 1291 permits review of "all final decisions of the district courts," and Fed. R. Civ. P. 54(b)

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1. Enelow v. New York Life Ins. Co., 293 U.S. 379 (1935) (a stay of a legal action on a contract to hear and determine an equitable fraud defense); Ettelson v. Metropolitan Life Ins. Co., 317 U.S. 188 (1942)(same).

provides that "any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action . . . and . . . is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." The orders here in question fit literally within Rule 54(b). The Supreme Court has, however, recognized that some orders which fall literally within Rule 54(b) are nevertheless final for purposes of appellate review. The task of the lower federal courts in identifying such orders has not been aided by the Court's propensity to treat as interchangeable cases arising from state courts under section 1257 and from district courts under section 1291.[2] Its most recent effort, on the federal side, to instruct as to what orders are reviewable under section 1291 despite Rule 54(b) is *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, ___ U.S. ___, 103 S.Ct. 927, 935 (1983), which reiterated the test for collateral finality announced in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978):

> To come within the "small class" of decisions excepted from the final judgment rule by *Cohen [v. Beneficial Loan Corporation*, 337 U.S. 541 (1949)], the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.

For purposes of our analysis we perceive Tilghman and Wheelabrator to be similarly situated, in that the denial of leave to appeal deprived the latter of the opportunity to

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2. *See, e.g.*, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 478-82 (1975); North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 159-62 (1973); Local 438, Construction & General Laborers' Union v. Curry, 543 U.S. 542, 549 (1963).

pursue the two issues — enforceability of the forum selection clause and *forum non conveniens* — which Tilghman raised in its section 1334(b) appeal. Thus we will address those two issues.

(1)

The *forum non conveniens* contention does not fit comfortably within the three-part *Coopers & Lybrand* formulation. The district court's affirmance established the rejection of the *forum non conveniens* contention as law of the case, and thus satisfied the first criteria — conclusive determination of the disputed question. A *forum non conveniens* determination cannot easily be made, however, without reference to the merits of the case. As the Supreme Court observed in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947), considerations relevant to a *forum non conveniens* ruling include:

> the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

These are considerations going to the merits of the case and requiring assessment of the substantive issues in the litigation. Moreover, even when a trial court misjudges a *forum non conveniens* claim, a reviewing court can, after final judgment, ascertain the degree of prejudice and reverse. *See United States v. MacDonald*, 435 U.S. 850, 859 (1978) (discussing post-trial review of speedy trial claim). Thus we do not believe that the rejection of a *forum non conveniens* claim is reviewable as a collaterally final order under section 1291.

(2)

The refusal to enforce the contractual forum selection clause, however, presents a different set of considerations. As with the *forum non conveniens* motion, the district court's affirmance has established that rejection as law of the case. Thus the first *Coopers & Lybrand* factor is satisfied. Moreover, the forum selection clause is far less obviously related to the substantive merits of the underlying dispute than is the *forum non conveniens* contention. We recognize, of course, that in determining whether or not to enforce such a clause the forum court may, as a matter of forum policy, look to factors similar to those bearing on the grant or denial of a *forum non conveniens* motion. *See Copperweld Steel Co. v. Demag-Mannesmann-Bohler*, 578 F.2d 953, 965 n.18 (3d Cir. 1978). Nevertheless a contractual clause selecting either a judicial or an arbitral forum for the resolution of disputes establishes a legal right which is analytically distinct from the rights being asserted in the dispute to which it is addressed. It is a right somewhat analogous to those recognized in *Abney v. United States*, 431 U.S. 651 (1977) (denial of motion to dismiss on double jeopardy grounds appealable under section 1291), and *Helstoski v. Meanor*, 442 U.S. 500 (1979) (denial of motion to dismiss on speech and debate clause grounds appealable under section 1291).

The more difficult question is whether the third *Coopers & Lybrand* factor is satisfied. In the *Abney* and *Helstoski* cases it was, because those cases involved claims of absolute immunity from participation in the legal proceedings in question, which could never be vindicated after final judgment. *See also Forsyth v. Kleindienst*, 599 F.2d 1203 (3d Cir. 1979), *cert. denied*, 453 U.S. 913 (1981) (claim of absolute official immunity). The right to specific performance of a forum selection clause is not absolute. Under the Supreme Court's formulation a court having subject matter jurisdiction

must weigh competing considerations in deciding on enforceability of such a clause.

If the party asserting the applicability of the forum selection clause prevails on the merits of the underlying dispute, however, an erroneous denial of its specific performance will obviously escape review after final judgment. Moreover, if that party should lose on the merits of the underlying dispute, it is not at all clear that the forum selection clause would be an available ground for a post-final judgment reversal. The trial would ordinarily have been held in a court having jurisdiction, and a federal statute provides:

> There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction.

28 U.S.C. §2105 (1976). This statute originated in section 22 of the Judiciary Act of 1789 as a qualification to the appellate jurisdiction of both the circuit courts and the Supreme Court over "final decrees and judgments in civil actions . . . upon a writ of error. . . ." 1 Stat. 73, 84. Thus it has never had any application to criminal cases, which under the 1789 Act were not appealable after final judgment,[3] or in appeals from state courts.[4] Moreover, since under the 1789 Act there was no equivalent of section 1292(a) or (b), the qualification should have no application to those subsequently enacted provisions. And since the 1789 Act in section 14, 1 Stat. 73, 81, provided separately for the exercise of discretionary review by common-law writs other than writs of error with no similar qualification, section 2105 can have no application to the discretionary interlocutory review provided for in the present equivalent of section 14, 28 U.S.C. §1651 (1976). Finally, when section 2105 was enacted there

3. Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 27 n.3 (1943).

4. Buck Stove and Range Co. v. Vickers, 226 U.S. 205, 213 (1912).

was no *Cohen* doctrine. Thus we think that the section was originally intended to apply only to writs of error after a full trial, and to prevent post-trial consideration of non-jurisdictional pleas in abatement. Consistent with that purpose, it should not be held to be applicable to those collateral matters not going to the merits of the underlying dispute which are appealable to the courts of appeal by virtue of the *Cohen* doctrine. The only instance in which section 2105 can properly apply is in an appeal from a final judgment after a trial on the merits.

In that context the statute may well apply to an erroneous rejection of a claim that a forum selection clause should have been enforced. Nineteenth century lawyers were obviously better versed in the meaning of pleas in abatement than are we, since Fed. R. Civ. P. 7(c) has abolished them in favor of motions. What is now included, we suppose, are those non-jurisdictional motions which, if granted, would result in the dismissal of an action without prejudice to its reconsideration when refiled in another forum or in another pleading. *See Bowles v. Wilke*, 175 F.2d 35, 37-38 (7th Cir.), *cert. denied*, 338 U.S. 861 (1949). A motion for specific enforcement of a forum selection clause would seem to fit that mold. Such a motion is non-jurisdictional, and has no direct bearing on the merits of the underlying dispute.

If, as appears, section 2105 would apply to a forum selection clause motion in a post-trial appeal, a ruling denying a motion would appear to satisfy all three of the criteria for review under the *Cohen* doctrine announced in *Coopers & Lybrand*. Thus entirely apart from the *Enelow-Ettelson* rule discussed in Part II. A above, we hold that an order denying a pre-trial motion to enforce a forum selection clause is reviewable as a collaterally final order under section 1291. We hold, moreover, that since section 2105 was intended to protect the interest of the parties and the federal courts in fully completed trials, it does not apply to a *Cohen* appeal on a collateral order. Thus assuming section 1291 applies to proceedings

relating to bankruptcy it would be a basis for jurisdiction to review the order denying the motion to enforce the forum selection clause.

C.

Sections 1291 and 1292(a)(1) afford appeals of right. In addition, 28 U.S.C. §1651 (1976), vests in the courts of appeals authority to issue writs in aid of their potential appellate jurisdiction. Unlike appeals under sections 1291 and 1292(a)(1), however, the relief available under section 1651 is not a matter of right. It involves the exercise of discretion in the appellate court in determining the appropriateness of interlocutory review of the order in question. There is no time limit for the filing of a petition for the relief available under section 1651, and thus there is no reason why this court may not treat an attempted appeal as such a review. We have on occasion done so. *Cheney State College v. Hufstedler*, No. 82-1282, slip op. (3d Cir. March 23, 1983); *Hackett v. General Host Corp.*, 455 F.2d 618, 626 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972). *See* 9 *Moore's Federal Practice* ¶110.28, at 316 (1982). Thus we clearly have the *power* under section 1651 to review both the *forum non conveniens* ruling and the forum selection clause ruling, assuming section 1651 applies to proceedings relating to bankruptcy. The question is whether, under the discretionary rules which have been developed under that section, that power should be exercised in given instances. 16 C. A. Wright, A. R. Miller, E. H. Cooper & E. Gressman, *Federal Practice and Procedure* §3932, at 206 (1977); *see generally* Berger, *The Mandamus Power of the United States Courts of Appeals: A Complex and Confused Means of Appellate Control*, 31 Buffalo L. Rev. 37 (1982). No authority has been called to our attention which would preclude the exercise of discretion in favor of pretrial review of either a *forum non conveniens* issue or a forum selection clause issue. In a case where the tri-

al court's error is on either issue egregious and the likely harm from delayed review serious we should exercise such review. Obviously, then, the appropriateness of section 1651 interlocutory review to some extent involves consideration of the merits of the challenged ruling. But we hold that if section 1651 applies to proceedings relating to bankruptcy we have discretionary power under that section to review both challenged rulings.

III.

Coastal contends that the jurisdictional provisions of the Bankruptcy Act of 1978 (Bankruptcy Code) preclude the exercise of this court's reviewing authority over either the *forum non conveniens* issue or the forum selection clause issue. Those provisions, Coastal contends, preempt sections 1291, 1292 and 1651. In its view, the Bankruptcy Code intended to place all pendente lite rulings of a bankruptcy court beyond the reach of the courts of appeals and the Supreme Court.' Since the federal appellate courts have had the remedial powers conferred by section 1651 since 1789, and those conferred in section 1292(a)(1) since 1891, Coastal's proposition is that the Bankruptcy Code placed the bankruptcy courts in a position in which their pendente lite rulings are to be more insulated from appellate review than those of any civil federal court in history. On its face the proposition seems extreme. Yet Coastal's argument from the text of the statute is plausible.

Original jurisdiction over Coastal's lawsuit depends on 28 U.S.C. §1471(b), which authorizes the district courts to exercise jurisdiction over "all civil proceedings arising under title 11 or arising in or related to cases under title 11." Coastal's claims depend on state law, and its complaint does not allege complete diversity, but article III of the Constitution permits the exercise of a protective federal jurisdiction as broad as section 1471(b). *Schumacher v. Beeler*, 293 U.S. 367 (1934). However,

the rulings in this instance were not made initially by an article III judge, but by a judge appointed under 28 U.S.C. §153 (Supp. V 1981). In light of *Northern Pipeline*, that judge can no longer proceed with the trial. That judge also may have lacked power to make the challenged rulings, since they are of a type ordinarily requiring judicial action. For present purposes, however, we will assume, arguendo, that because the *Northern Pipeline* mandate was withheld until December 23, 1983, the bankruptcy judge had authority to pass on the Tilghman and Wheelabrator motions.

Bankruptcy appeals are dealt with in two Bankruptcy Code provisions. 28 U.S.C. §1293 (Supp. V 1981) refers to the courts of appeals:

> (a) The courts of appeals shall have jurisdiction of appeals from all final decisions of panels designated under section 160(a) of this title.
> (b) Notwithstanding section 1482 of this title, *a court of appeals shall have jurisdiction of an appeal from a final judgment, order, or decree of an appellate panel* created under section 160 or *District Court of the United States*, or from a final judgment, order, or decree of a bankruptcy court of the United States if the parties to such appeal agree to a direct appeal to the court of appeals.

Because in this circuit no panels have been designated under section 160(a), and in this case the parties did not consent to a direct appeal to the court of appeals, only the italicized language of section 1293(b) is relevant; "a court of appeals shall have jurisdiction of an appeal from a final judgment, order, or decree of . . . a District Court of the United States. . . ." That language must be read in conjunction with the section governing appeals from bankruptcy courts to district courts:

> (a) The district courts for which panels have not been ordered appointed under section 160 of this ti-

> tle shall have jurisdiction of appeals from all final judgments, orders, and decrees of bankruptcy courts.
>
> (b) The district courts for such districts shall have jurisdiction of appeals from interlocutory orders and decrees of bankruptcy courts, but only by leave taken of the district court to which the appeal is taken.

28 U.S.C. §1334 (Supp. V 1981).[5] Coastal's position as to the meaning of these provisions is straightforward. According to Coastal, section 1293(b) is exclusive and preemptive. It permits review of district court appellate decisions made under section 1334(a), but not district court decisions under section 1334(b). The former include only judgments which would be final under section 1291. The latter include all matters formerly reviewable under section 1292(a)(1), section 1292(b) and section 1651. All such matters, Coastal urges, are now the province of the district court, and neither the courts of appeals nor the Supreme Court may review them until after final judgment, if then.

Although section 1293(b) has been considered by us twice before, in neither case did we have occasion to address the Coastal contention.[6] Both involved matters which were before the district court under section 1334(a). *See Matter of Marin Motor Oil, Inc.*, 689 F.2d 445, 447 (3d Cir. 1982), *cert. denied*, 103 S.Ct. 1196 (1983); *Universal Minerals, Inc. v. C.A. Hughes & Co.*,

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5. The provisions governing appeals to panels designated pursuant to section 60(a) are essentially identical. 28 U.S.C. §1482 (Supp. V 1981).

6. In re Bildisco, 682 F.2d 72 (3d Cir. 1982), *cert. granted sub nom.* NLRB v. Bildisco and Bildisco, 103 S.Ct. 784 (1983) (Nos. 82-818, 82-852), does not discuss appellate jurisdiction, but appears to have involved an appeal from a matter which was before the district court under section 1334(a).

669 F.2d 98, 100-01 (3d Cir. 1981). Thus the availability of interlocutory appellate review of orders in proceedings relating to bankruptcy is a question of first impression in this court. It is, moreover, a question of enormous significance, involving the power of this court and of the Supreme Court to review such important matters as preliminary injunctions issued in the vast range of cases entertainable under section 1471(b). If Coastal is right, the bankruptcy courts have been given pendente lite powers, subject only to district court review, equivalent to those exercised by the federal circuit courts prior to the passage of the Evarts Act in 1891.

Prospectively, Coastal's position, at least in cases such as this which are proceedings relating to bankruptcy, must be rejected. *Northern Pipeline* holds that bankruptcy courts may not entertain such related proceedings. In reaction to that holding the Judicial Conference of the United States urged adoption of local rules for the processing of bankruptcy and bankruptcy related cases. The District of New Jersey has done so. Its rule provides that

> [o]rders and judgments of bankruptcy judges in civil proceedings related to cases arising under Title 11, but not arising in or under Title 11, or wherever otherwise constitutionally required, judgments as defined in Rule 54(a) of the Federal Rules of Civil Procedure, which would be appealable if rendered by a district judge and which do not result from a stipulation among the parties, shall not be effective and shall not be entered until the judgment has been signed by a district judge.

Local Rule 47(C)(3). Since the purpose of this provision is to meet the constitutional deficiencies recognized in *Northern Pipeline*, it is plain that orders entered in related proceedings must be considered orders of the district courts, not of the bankruptcy courts. They will not fall

within section 1334, and thus will not be governed by section 1293. As orders of the district court they will be governed by sections 1291, 1292 and 1651. Indeed in this case all future orders must, under Local Rule 47(C)(3), be entered by the district court.

The question thus presented is whether, in related proceedings in which orders have been entered prior to December 23, 1982, we should hold that section 1293 applies, rather than sections 1291, 1292 and 1651. From a purely mechanical viewpoint sections 1334 and 1293 were technically applicable during that period because the Supreme Court in *Northern Pipeline* made its holding effective on December 23, 1982. The policies which it identified for a nonretroactivity holding in *Northern Pipeline* have no application, however, to the instant appeal. In *Northern Pipeline* the Court observed "that retroactive application would not further the operation of our holding, and would surely visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts." 102 S. Ct. at 2880. There is no hardship in a retroactive application of the *Northern Pipeline* holding in this instance, because the case has not yet been tried, and when it is, it must be tried in the district court, not the bankruptcy court. Indeed the same motions could now be renewed, and under Local Rule 47(C)(3) orders disposing of them would have to be entered in the district court. It seems to us the height of artificiality to apply today the nonretroactivity holding of *Northern Pipeline* so as to place under section 1293 orders which tomorrow will fall within sections 1291, 1292 and 1651.

We hold, therefore, that orders entered in proceedings related to bankruptcy, which were made by the district court pursuant to section 1334, should be deemed orders of the district court and governed by sections 1291, 1292 and 1651. That holding makes it unnecessary in this case to consider whether Congress intended

in sections 1293 and 1334 to insulate pendente lite orders of the bankruptcy court from all supervision by the courts of appeals. The question will arise, of course, with respect to cases arising under title 11 as distinguished from cases in or related to such cases. For the present it suffices to note that even with respect to cases arising under title 11 the construction of sections 1334(b) and 1293(b) advanced by Coastal may not have been intended by Congress.[7] We are particularly doubtful that Congress intended in sections 1293 and 1334(b) to limit the powers of the courts of appeals or the Supreme Court under Section 1651.

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7. The evolution of section 1293 is complex. The original bankruptcy code bill, H.R. 8200, which passed the House on February 1, 1981, 124 Cong. Rec. H 478 (daily ed. Feb. 1, 1978), made bankruptcy courts article III courts, and provided for appeals to the courts of appeals under sections 1291 and 1292. H.R. 8200, 95th Cong., 1st Sess. §§237, 238 (1977). Under the original version of the Senate bill, S. 2266, appeals were routed through the district courts, and no reference was made to the jurisdiction of the courts of appeals. The Report of the Senate Judiciary Committee on S. 2266 observed that section 1291 governed such appeals. S. Rep. No. 989, 95th Cong., 2d Sess. 18 (1978). The Senate approved S. 2266 on September 7, 1978. 124 Cong. Rec. S14745 (daily ed. Sept. 7, 1978). As enacted the Bankruptcy Code resulted from a compromise between the Senate and House floor managers of the legislation, and it is in this bill that what is now section 1293 first appears as section 236(a). In its original version, section 236 merely addressed court of appeals jurisdiction over orders of the bankruptcy courts and panels. The only discussion of the section is as follows:

> An appeal from a decision of a bankruptcy court will be taken to the district court of the district within which the bankruptcy court is located, unless the circuit council of the circuit in which the bankruptcy court is located orders appeals to be taken to a panel of bankruptcy judges comprised of three bankruptcy judges, or both parties by agreement agree to proceed directly to the circuit court of appeals of the circuit in which the bankruptcy court is located. The subject of appeals is dealt with in sections 201, 236, 237, 238, 240, and 241 of title II of the

Our holding that orders entered in proceedings relating to bankruptcy are district court orders reviewable pursuant to sections 1291, 1292 and 1651 is necessarily predicated on the tacit assumption that despite *Northern Pipeline* the grant of district court subject matter jurisdiction in section 1471(b) survives. We find nothing in the *Northern Pipeline* opinions suggesting otherwise. Indeed the *Northern Pipeline* holding that article III judges must exercise the related proceedings jurisdic-

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NOTE — *(Continued)*

House amendments which in turn create provisions in sections 136, 1293, 1294, 1334, 1408, and 1482 of title 28 implementing the previously described system of appeals.

124 Cong. Rec. H11107 (daily ed. Sept. 28, 1978). The additional reference to review of district court orders was made on the Senate floor without explanation or discussion. 124 Cong. Rec. H11865-67 (daily ed. Oct. 6, 1978). Thus for all practical purposes there is no legislative history for the section.

One commentator, describing the appeal provisions of the Bankruptcy Code as "nearly incomprehensible," suggests three alternative readings of section 1293. 16 C. A. Wright, A. R. Miller, E. H. Cooper & E. Gressman, *Federal Practice and Procedure* §3926, at 38-43 (Supp. 1983). Another commentator suggests that in the absence of a specific reference courts should not attribute to Congress an intention to supercede section 1292 in bankruptcy cases. Kennedy, *The Bankruptcy Court Under the New Bankruptcy Law*, 11 St. Mary's L.J. 251, 292-93 (1979). Nowhere in the Congressional Record or in the bills which either house of Congress considered is there any reference to section 1651.

Given the enormity of the change in law which would bar all court of appeals and Supreme Court review of interlocutory orders in bankruptcy cases, and the complete absence of discussion of such a change, we are not ready to assume without critical analysis that those courts which have held such review to be barred are correct. *See* In re Regency Woods Apartments, Ltd., 686 F.2d 899, 901 (11th Cir. 1982); In re Riddervold, 647 F.2d 342, 343 (2d Cir. 1981); In re Continental Investment Corp., 637 F.2d 1, 3 (1st Cir. 1980).

tion rests on the assumption that the jurisdictional grant is operative. Thus Local Rule 47(C)(3) which provides for the continued exercise of section 1471(b) jurisdiction by the district courts is consistent with the Bankruptcy Code and the *Northern Pipeline* decision.

Coastal also urges that appellate review is precluded by 28 U.S.C. §1471(d) (Supp. V 1981), which provides:

> Subsection (b) or (c) of this section does not prevent a district court or a bankruptcy court, in the interest of justice, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11. Such abstention, or a decision not to abstain, is not reviewable by appeal or otherwise.

We have held that section 1471(b) jurisdiction still lies in the district court. Obviously then, section 1471(d) still qualifies that jurisdiction. We hold, however, that neither a forum selection clause ruling nor a *forum non conveniens* ruling is an abstention decision. The House Report on the Bankruptcy Code states that "[t]he subsection recognizes the exigencies that arise in such cases as *Thompson v. Magnolia Petroleum*, 309 U.S. 478 (1940), in which it is more appropriate to have a State court hear a particular matter of State law." H. R. Rep. No. 595, 95th Cong., 1st Sess. 446 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 6401. There is no indication in the legislative history of the Bankruptcy Code that Congress regarded issues like the enforceability of a contractual forum selection clause to be abstention issues. A decision on enforceability of such a clause involves a substantive contractual right. A *forum non conveniens* ruling also involves a substantive right, in the sense that it relates directly to the ability of the parties to prepare and present their respective cases. Tilghman and Wheelabrator are not asking the court to

refrain from entertaining the action and relegate Coastal to a New Jersey court. Their position is that any New Jersey forum, state or federal, must as a matter of law dismiss because they are legally entitled to have the dispute resolved in England. Section 1471(d) does not bar appellate review of the rejection of that position.

Since we clearly have jurisdiction under section 1292(a)(1) to review the order denying the Tilghman-Wheelabrator motion to enforce the forum selection clause, since that order is also reviewable as a collaterally final order under section 1291, and since we can under section 1651 consider the propriety of the denial of a motion to dismiss on *forum non conveniens* grounds, Coastal's motion to dismiss the appeal will be denied.

IV.

Our ruling on Coastal's jurisdictional motion requires consideration of the merits.

A. The Forum Selection Clause

An initial concern is the governing law for determination of enforceability of the forum selection clause. The fact that the case is in the district court because of the grant of protective federal jurisdiction in section 1471(b) does not alter the legal rules which created the original relationship between Coastal and the parties with which it dealt. The federal question jurisdiction provided in article III, section 2 of the Constitution authorizes Congress to provide a federal forum for the convenient enforcement of rights of debtors dependent upon legal relationships arising out of non-federal law. *Schumacher v. Beeler*, 293 U.S. 367 (1934). But Congress did not in section 1471(b), and perhaps could not constitutionally, federalize those legal relationships. *See* Hill, *The Erie Doctrine in Bankruptcy*, 66 Harv. L. Rev. 1013 (1953).

The Supreme Court in *The Bremen* and in *Scherk* appears to have assumed, without saying so, that in a federal forum the enforceability of a forum selection clause is determined by a generally applicable federal law. This court in *Copperweld Steel Co. v. Demag-Marnnesmann-Bohler*, 578 F.2d 953, 965-66 (3d Cir. 1978), appears to have made the same unarticulated assumption. It is not entirely clear why, absent a statute such as the Federal Arbitration Act, the enforceability of a contractual forum selection clause should properly be divorced from the law which in other respects governs the contract. *See Leasewell, Ltd. v. Jake Shelton Ford, Inc.*, 423 F. Supp. 1011, 1014 (S.D. W. Va. 1976); *Davis v. Pro Basketball, Inc.*, 381 F. Supp. 1, 3 (S.D.N.Y. 1974) (state law determines enforceability). *Compare, e.g., Taylor v. Titan Midwest Construction Corp.*, 474 F. Supp. 145, 147 (N.D. Tex. 1979); *St. Paul Fire and Marine Insurance Co. v. Travelers Indemnity Co.*, 401 F. Supp. 927, 929 (D. Mass. 1975 (federal law determines enforceability). We noted the choice of law problem in *Central Contracting Co. v. Maryland Casualty Co.*, 367 F.2d 341, 344-45 (3d Cir. 1966), and the absence of a discussion of it in *Copperweld Steel* suggests that in this circuit it remains unresolved. It need not be resolved in this case either, for each jurisdiction the law of which is arguably relevant takes substantially the same position with respect to enforceability of contractual forum selection provision. *See The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10-11 (1972) (federal admiralty law); id. at 11 & n.12 (English law); *Air Economy Corp. v. Aero-Flow Dynamics, Inc.*, 122 N.J. Super. 456, 457, 300 A.2d 856, 857 (App.Div. 1973) (citing *Central Contracting Co. v. Maryland Casualty Co.*, which was cited with approval in *The Bremen*) (New Jersey law). *The Bremen* announces a general rule which would be applied in each of the arguably interested jurisdictions.

That rule is that a forum selection clause is presumptively valid and will be enforced by the forum unless the party objecting to its enforcement establishes (1) that it is the result of fraud or overreaching, (2) that enforcement would violate a strong public policy of the forum, or (3) that enforcement would in the particular circumstances of the case result in litigation in a jurisdiction so seriously inconvenient as to be unreasonable. Coastal does not contend that the clause in the Tilghman-Farmer Norton contract was the result of fraud or overreaching, and neither the district court nor the bankruptcy court relied on this factor. Thus we turn to their treatment of the other two.

(1) Policy of the Forum

The bankruptcy court, but not the district court, found in the Bankruptcy Code's provision for related proceedings jurisdiction a codification of a policy disfavoring forum selection clauses. Coastal Appendix, Exhibit I, at 11-13. We agree that Congress, in enacting a broad protective federal jurisdiction provision, adopted a policy of facilitating the collection and distribution of debtor estates. We do not agree, however, that section 1471(b) was meant to change the contractual rights of the parties. A bankruptcy trustee may assume or reject an executory contract. 11 U.S.C. §365(a); *In re Bildisco*, 682 F.2d 72 (3d Cir. 1982), *cert. granted sub nom. NLRB v. Bildisco and Bildisco*, 103 S.Ct. 784 (1983) (Nos. 82-818, 82-852). But when relying on a contract in proceedings brought under section 1471(b) a trustee or debtor takes the contract as the parties made it. Nothing in the legislative history of the Bankruptcy Code has been called to our attention suggesting that Congress intended to make a change in the public policy favoring forum selection clauses which is manifested in the Federal Arbitration Act, 9 U.S.C. §§1-14 (1976), or in the common law announced in *The Bremen* and similar

state and federal cases. Section 1471(b) does not announce a contrary public policy. At best the grant of protective federal jurisdiction over proceedings related to title 11 is one circumstance to be taken into account in making the unreasonableness determination.

(2) Unreasonableness Under the Circumstances

The first circumstance relied on by the district court in support of the conclusion that enforcement of the forum selection clause is Coastal's claimed status as a third-party beneficiary with the Tilghman-Farmer Norton contract. The court reasoned that in *The Bremen* the clause was enforced in order to leave the parties to their bargain, whereas Coastal was not a participant in the Tilghman-Farmer Norton bargain. Coastal Appendix, Exhibit J, at 9-10. The *Bremen* Court did refer to the policy of noninterference with a freely negotiated contract. 407 U.S. at 12, 14, 16, 17. The primary rationale of that Court, however, and of others which have enforced forum selection clauses, is that those clauses promote stable and dependable trade relations. *Id.* at 8-9, 13-14. Introducing into the common law of enforceability of forum selection clauses a third-party beneficiary exception would be inconsistent with that rationale. It would, moreover, be inconsistent with the law of contracts, which has long recognized that third-party beneficiary status does not permit the avoidance of contractual provisions otherwise enforceable. *See, e.g., Trans-Bay Engineers and Builders, Inc. v. Hills*, 551 F.2d 370, 378 (D.C. Cir. 1976); *Process and Storage Vessels, Inc. v. Tank Service, Inc.*, 541 F. Supp. 725, 733 (D. Del. 1982). Coastal chose to do business with Farmer Norton, an English firm, knowing that Farmer Norton would be acquiring components from other English manufacturers. Thus it was perfectly foreseeable that Coastal would be a third-party beneficiary of an English contract, and that such a contract would provide for liti-

gation in an English court. Reliance on Coastal's third-party beneficiary status as a reason for disregarding such a clause was an error of law.

The second circumstance relied on by the district court for denying enforcement is that Coastal has asserted tort claims as well as contract claims, and that the forum selection clause is inapplicable to the former. The difficulty with this reasoning is that it ignores the reality that the Tilghman-Farmer Norton contract is the basic source of *any* duty to Coastal. There is no evidence suggesting that the clause was not intended to apply to all claims growing out of the contractual relationship. If forum selection clauses are to be enforced as a matter of public policy, that same public policy requires that they not be defeated by artful pleading of claims such as negligent design, breach of implied warranty, or misrepresentation. Coastal's claims ultimately depend on the existence of a contractual relationship between Tilghman and Farmer Norton, and those parties bargained for an English forum. We agree with those courts which have held that where the relationship between the parties is contractual, the pleading of alternative non-contractual theories of liability should not prevent enforcement of such a bargain. *See Bense v. Interstate Battery System of America, Inc.*, 683 F.2d 718 (2d Cir. 1982) (franchise agreement with forum selection clause and antitrust claim); *Gordonsville Industries, Inc. v. American Artos Corp.*, 549 F. Supp. 200 (W.D. Va. 1982) (contract for industrial installation with forum selection clause and state law design defect, negligence, and warranty claims); *Hoes of America, Inc. v. Hoes*, 493 F. Supp. 1205 (C.D. Ill. 1979) (distributorship agreement with forum selection clause and state law business tort claim). Reliance on the new contract claims as a reason for disregarding the forum selection clause was on this record improper.

A third circumstance relied on by the district court for denying enforcement is the presence in the case of

Wheelabrator, an American corporation. But while it would be inconvenient for Coastal to have to proceed in two separate forums against the separate defendants, in this instance Coastal does not face that problem. Wheelabrator has agreed to submit to the jurisdiction of an English court. Moreover Wheelabrator's only significant status in the case is as Tilghman's parent. The pleadings suggest that Wheelabrator did some work on the blast unit on Tilghman's behalf, but they do not suggest that this work, separately, was responsible for Coastal's losses. Thus reliance on Wheelabrator's presence in the case as a ground for requiring that Tilghman litigate in New Jersey was on this record improper.

The district court also alluded to the large amount of potential evidence in this country. Neither court found expressly that an inspection of the plant would be required, however, and the depositions on file show that Coastal has examined in England a number of English witnesses. Under *The Bremen* formulation the party objecting to enforcement of a forum selection clause has the burden of establishing the unreasonableness of such enforcement. In this case Coastal's showing is in our view legally insufficient. The availability of witnesses is a problem in either jurisdiction, but an insurmountable problem in neither. That factor appears to us essentially in equipoise. The only additional factor Coastal alludes to is the supposed difficulty of obtaining counsel in England. Tilghman has the same problem here.

Finally the district court referred to the fact that under a plan of reorganization, now confirmed, Coastal's creditors have an interest in any sums which may be recovered from Tilghman. This factor has a Robin Hood quality, and reliance on it would be plainly improper.

(3) Other Contentions

We conclude, therefore, that none of the reasons relied on by either the bankruptcy court or the district

court for denying the motion for enforcement of the forum selection clause is legally sufficient. Coastal advances two others. The first is that Wheelabrator filed a proof of claim in the bankruptcy proceeding, and in so doing, waived any objection it or Tilghman might have to the exercise of jurisdiction under section 1471(b) in New Jersey. We know of no authority supporting the proposition that the filing of a proof of claim is a waiver of the provisions of a forum selection clause. The second is that by virtue of the provisions of the confirmed Plan of Reorganization, which retained jurisdiction over the Tilghman-Wheelabrator case, the defendants are barred by res judicata from objecting to trial in the bankruptcy court. The confirmed Plan plainly did not adjudicate anything respecting the instant dispute. Thus, both contentions are entirely without merit. The Tilghman-Wheelabrator motions to dismiss the complaint so as to enforce the forum selection clause should in this case have been granted.

V.

Because we hold that the forum selection clause should have been enforced, the *forum non conveniens* ruling need not be addressed in detail. It suffices to note that since there are inconveniences associated with the trial of the underlying dispute in either forum, we probably could not hold that the bankruptcy court committed an abuse of discretion in denying the motion to dismiss on that ground.

VI.

Coastal's motion to dismiss the appeal will be denied. The order affirming the bankruptcy court's denial of the Tilghman-Wheelabrator motion will be reversed, and the case remanded to the district court for the entry of an order, pursuant to Local Rule 47(C)(3), dismissing Coastal's complaint on appropriate conditions with re-

spect to Wheelabrator's appearance in an English court, and with respect to waiver of any statute of limitations problem. *See MacLeod v. MacLeod*, 383 A.2d 39 (Me. 1978) (*forum non conveniens* dismissal conditioned on consent to have action in another court deemed commenced on date of original action).

ROSENN, *Circuit Judge*, Concurring.

Like the majority, I believe that this case should be tried in the English courts in accordance with the forum selection clause in the Tilghman-Farmer Norton contract under which Coastal Steel claims third-party beneficiary status. I therefore join in the majority's discussion of the merits and disposition of the case. I write separately, however, because I fear that the majority, in struggling to find a basis for appellate jurisdiction in this case, has employed an analysis that leaves in disarray doctrines of appealability that are firmly established in the law of this circuit.

The majority concludes on three different but equally shaky grounds that the bankruptcy court's order of November 9, 1981, which the district court affirmed, is now properly before us. The majority also attempts, through a dubious path of reasoning, to circumvent the constraints arguably imposed on appellate review of bankruptcy cases by 28 U.S.C. §1293, relying on a notion of retroactivity that I believe lacks legal foundation and logic as applied to the instant case.

I fully appreciate the need for an inquiry into whether authority exists to justify appellate jurisdiction in this case. If statutes and judicial doctrines provide a reasonable basis for us to review the district court's decision, we should not take an exceedingly narrow and technical approach to our own jurisdiction, but instead should dispose of the case on the merits. I do believe,

however, that the majority's analysis is tortuous and unnecessary. Instead, I would rely on the flexible and straightforward logic of *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964), as the basis for appealability in this case.

I.

The instant case arose as part of a proceeding in the United States Bankruptcy Court for the District of New Jersey. Coastal Steel, the debtor, filed its complaint against Tilghman and the other defendants under 28 U.S.C. §1471(b), relying on the pendency of the bankruptcy proceeding as the basis for federal subject matter jurisdiction. The bankruptcy court denied Tilghman's motion to dismiss on the basis of the forum selection clause and the doctrine of *forum non conveniens*, and the district court granted Tilghman leave to appeal under 28 U.S.C. §1334(b). On May 27, 1982, the district court affirmed the order of the bankruptcy court denying Tilghman's motion, and refused to certify its own order for interlocutory appellate review under 28 U.S.C. §1292(b). Tilghman now attempts to invoke this court's jurisdiction, offering several possible theories for appealability.

The majority finds that appellate jurisdiction is proper under sections 1291, 1292(a), and 1651. The most serious obstacle to this conclusion is Coastal's argument that, because this is an appeal from an action related to a bankruptcy proceeding, none of these three sections applies, and that instead we must determine whether we have jurisdiction solely in terms of the special requirements of section 1293, which is in effect during the transition period under the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 95 Stat. 2549. The majority disingenuously manages to avoid this problem. Moreover, even assuming that it is appropriate to evaluate this case with reference to the standards for

appealability of ordinary (non-bankruptcy) civil matters, I am certain that jurisdiction does not exist under section 1292, and I have grave doubts as to the applicability of sections 1291 and 1651.

A.

Coastal argues that our authority to review the orders of the bankruptcy court and the district court cannot be determined under sections 1291, 1292, or 1651, but is governed solely by 28 U.S.C. §1293. Subsection (b) of this statute provides:

> Notwithstanding section 1482 of this title, a court of appeals shall have jurisdiction of an appeal from a final judgment, order, or decree of an appellate panel created under section 160 or a District court of the United States or from a final judgment, order, or decree of a bankruptcy court of the United States if the parties to such appeal agree to a direct appeal to the court of appeals.

Coastal argues that this section totally preempts sections 1291, 1292, and 1651, and that if the order in this case is appealable, it must be in accordance with section 1293. Although sections 1292 and 1651 authorize interlocutory review in certain types of civil cases, section 1293 by its terms limits appellate jurisdiction to a "final judgment, order, or decree" of a district court or a bankruptcy court. Therefore, if section 1293 is indeed the exclusive route to the court of appeals in bankruptcy cases, Tilghman's appeal cannot be heard unless the decision below was "final."

In two recent cases, this circuit has described section 1293 as providing "a comprehensive and exclusive schema for jurisdiction of bankruptcy appeals." *In re Marin Motor Oil, Inc.*, 689 F.2d 445, 447 (3d Cir. 1982) *cert. denied*, 103 S.Ct. 1196 (1983); *Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 101 n.3 (3d Cir. 1981). As the majority correctly observes, these state-

ments may be treated as dictum for purposes of the instant case for both of these cases involved orders that were adjudged to be final. Thus, there was no need for us to consider whether section 1293 actually precluded interlocutory review. The majority summarizes several sound arguments for the view that Congress could not possibly have intended to insulate orders of the bankruptcy courts from interlocutory review by the courts of appeals. Ultimately, however, the majority avoids ruling on this question by taking refuge in the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 102 S.Ct. 2858 (1982).

As alluded to by the majority, the Court held in *Northern Pipeline* that Congress acted unconstitutionally in granting bankruptcy courts the authority to entertain proceedings "relating to" bankruptcy. The effect of that decision is to require that henceforth all such proceedings be heard by the district courts under 28 U.S.C. §1471. I believe the majority's reliance on this case to circumvent the need to construe section 1293 is misplaced for several reasons.

First, the majority's analysis involves a novel extension of the retroactive effect of *Northern Pipeline*. To prevent the havoc that would have ensued if actions taken by bankruptcy judges in good faith reliance on the statutory scheme were suddenly invalidated, the Court declared that its holding of unconstitutionality would not be retroactive. In the face of that recent unequivocal holding, the majority asserts that there is no reason not to apply the *Northern Pipeline* decision retroactively to this case, reasoning that since Coastal's claims have yet to be tried, there will be no hardship to the parties in invalidating the actions taken by the bankruptcy court. But it cannot be doubted that the Supreme Court, in deciding *Northern Pipeline*, must have contemplated the possibility that in some cases a holding of retroactivity would cause little hardship or injustice, but nevertheless believed that in a substantial number of cases justice

would not be served by making the decision retroactive. No legal basis justifies the majority's decision to embrace "selective" retroactivity.

Second, if, despite the Supreme Court's holding of nonretroactivity, the instant case could somehow be brought within the bounds of *Northern Pipeline*, an even more serious problem is created. By applying *Northern Pipeline* to the orders involved here, the majority succeeds only in invalidating the bankruptcy court's order refusing to dismiss the complaint on the grounds of the forum selection clause or *forum non conveniens*. This order was entered on November 9, 1981, as part of a "related proceeding" that *Northern Pipeline* holds bankruptcy courts cannot entertain. Since the bankruptcy court thus acted beyond its authority, the inescapable conclusion is that its order is void. Admittedly, if this order had been entered after October 1, 1982, it would have been saved by Local Rule 47(C)(3) of the District of New Jersey, which provides that "orders and judgments of bankruptcy judges in civil proceedings related to cases arising under Title 11" will be effective only when they have been signed by a district judge. As the majority notes, this local rule was passed shortly after the *Northern Pipeline* decision to prevent disruption of such proceedings as a result of the Supreme Court's ruling. The effect of the local rule is to transform what would have been orders of the bankruptcy courts into orders of the district courts under 28 U.S.C. §1471(b) so that the order will have been entered by an Article III judge. But because the order of the bankruptcy court rejecting Tilghman's motion to dismiss was entered before this local rule was passed, it cannot possibly be treated as an order entered by the district court under section 1471(b).

Whatever vitality the order possessed is attributable to it only as an order of the bankruptcy court that was appealed to and affirmed by the district court under 28 U.S.C. §1334(b). Its life ended at the moment the rule of

Northern Pipeline became applicable to such orders. The majority completely ignores this insurmountable problem: once it has held — erroneously, in my view — that *Northern Pipeline* applies retroactively to the bankruptcy court's order in the instant case, it has totally destroyed the validity of that order. Therefore, instead of reviewing the merits of the appeal, the majority must direct that the bankruptcy court's unlawful order be vacated.[1]

I do not see how the orders involved in the instant case can possibly survive application of the *Northern Pipeline* decision. But even if they could somehow survive, I question the majority's assumption that the difficult section 1293 problem is thereby avoided. The majority concludes that "orders entered in proceedings relating to bankruptcy are district court orders reviewable pursuant to sections 1291, 1292, and 1651." Typescript op. at 28. But it is arguable that all orders in bankruptcy cases — whether entered by a bankruptcy court and then appealed to a district court under 28 U.S.C. §1334 or entered by a district court under 28 U.S.C. §1471(b) — are reviewable by the court of appeals *only* in accordance with the provisions of 28 U.S.C. §1293. There is no basis for the majority's implicit assumption that section 1293 only governs appeals from district court decisions where the district court was itself acting as an appellate court. Nothing in section 1293(b)'s langauge so limits it application. Indeed, on its

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1. This problem demonstrates precisely why the Supreme Court must have elected not to make its *Northern Pipeline* decision retroactive. In the wake of that decision, it was relatively easy for the federal district courts to adopt local rules for the processing of future bankruptcy cases. But there was no way for the federal judiciary to validate retroactively those bankruptcy court orders entered prior to *Northern Pipeline* and appealed to the district courts under 28 U.S.C. §1334(b). To prevent these orders from being suddenly invalidated, the Court had no choice but to make its decision nonretroactive.

face the provision appears to pertain to appeals from any district court proceeding in bankruptcy: it refers to jurisdiction over appeals from "a final judgment, order, or decree of . . . [a] District Court of the United States." The order now before us is such a final order, regardless of the capacity in which the district court was acting when it entered the order.[2]

I fail to see why Congress' attitude toward interlocutory appellate review in proceedings relating to bankruptcy would depend on whether the order originated in the bankruptcy court or in the district court. If section 1293(b) is indeed "a comprehensive and exclusive schema for jurisdiction of bankruptcy appeals," *In re Marin Motor Oil, supra*, 689 F.2d at 447-48, then our review under the statute would be limited to final orders of the district courts.

Thus, I believe the majority has no alternative but to face directly the question whether section 1293, which does not provide for interlocutory review, sets forth the exclusive route to the court of appeals in cases relating to bankruptcy. If it is, as our prior decisions have implied, then neither section 1292 nor section 1651 is an available source for appealability in this case.[3]

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2. I recognize that, as the statute is written, Congress apparently did not expect the district courts to exercise jurisdiction under 1471(b), as section 1471(c) appears to require that bankruptcy-related cases be brought first in a bankruptcy court. *See Northern Pipeline, supra*, 102 S.Ct. at 2862. Congress may have expected that section 1293(b) would be used in conjunction with section 1334. But I do not believe we can conclude that Congress intended section 1293 *not* to apply in conjunction with section 1471.

3. Technically, of course, section 1291 appellate jurisdiction would also be unavailable. However, section 1291 itself contains a finality requirement, and several courts, including our own, have grafted onto section 1293(b) the qualifications on the finality rule that have been developed by the courts under 28 U.S.C. §1291. *See* In re Marin Motor Oil, Inc., *supra*; In re Regency Woods Apartments, Ltd., 686 F.2d 899, 902 (11th Cir. 1982); In re Callister, 673 F.2d 305, 306 (10th Cir. 1982).

B.

Having dealt with the formidable obstacle presented by 28 U.S.C. §1293(b) in an unsatisfactory manner, the majority concludes that we have jurisdiction over this appeal pursuant to both 28 U.S.C. §1292 and 28 U.S.C. §1651. Assuming that it is proper to look to these two sections as authority for jurisdiction over interlocutory bankruptcy appeals, neither section provides a basis for our review. The requirements of section 1292(a) cannot be met, notwithstanding the strained analogies the majority employs. And I have considerable doubts whether this is a proper case for review by mandamus.

1. *Section 1292(a) and the Enelow-Ettelson doctrine*

Section 1292(a) provides for jurisdiction over interlocutory appeals involving district court orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." It cannot be seriously maintained that the bankruptcy court's order denying Tilghman's request to dismiss the case in accordance with the forum selection clause, or alternatively on the ground of *forum non conveniens*, is an order denying an injunction. Instead, the majority relies on the so-called *Enelow-Ettelson* doctrine, *Enelow v. New York Life Insurance Co.*, 293 U.S. 379 (1935); *Ettelson v. Metropolitan Life Insurance Co.*, 317 U.S. 188 (1942), under which a request to stay an action at law pending resolution of an equitable defense is considered analogous to a request for an injunction. The majority concludes that the instant case comes within the *Enelow-Ettelson* rule because Tilghman's motion to dismiss the action in order to give effect to a forum selection clause is "analytically indistinguishable from a motion to stay an action at law pending arbitration." Typescript op. at 8. In essence, the majority's argument is that Tilghman's motion is analogous to another type of

motion which, according to the Supreme Court, is itself sufficiently analogous to a request for an injunction to come under section 1292. I do not believe that this argument can withstand scrutiny.

Professor Moore explains the *Enelow-Ettelson* doctrine as follows:

> If an initial action is filed that could formerly have been maintained only at law, and if a stay of that action is sought to permit advance determination of matter that could formerly have been urged only by bill in equity, an order granting or denying the stay is appealable as an injunction under 28 U.S.C. §1292(a)(1).

9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* ¶ 110.20[3], at 242 (1983) (footnote omitted). It is settled that one type of motion appealable under the *Enelow-Ettelson* doctrine is a motion to stay an action pending arbitration of issues that the defendant contends are subject to an arbitration agreement. In *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U.S. 449 (1935), the Supreme Court held that the defense setting up the arbitration agreement is in the nature of an equitable defense, and that the grant or denial of a stay sought under the United States Arbitration Act is therefore appealable, provided the action sought to be stayed is legal in nature. But as I see the cases, the Court has demonstrated a reluctance to expand the contours of this doctrine, preferring to keep *Enelow-Ettelson* as a narrow modification of the injunction exception to the finality requirement. The Court has indicated that the *Enelow-Ettelson* rule should not be extended into new areas on "merely logical grounds." 9 *Moore's Federal Practice*, *supra*, at 252. For example, in *Baltimore Contractors v. Bodinger*, 348 U.S. 176, 184 (1955), the Court was not persuaded to extend the rule merely because of "incongruities" that arise out of "the

persistence of outmoded procedural differentiations." Rather, the Court concluded that "it is better judicial practice to follow the precedents which limit appealability of interlocutory orders, leaving Congress to make such amendments as it may find proper." *Id.* at 185.

Most courts have declined to extend the *Enelow-Ettelson* rule beyond the *precise* situations in which the Supreme Court has approved it. As a result, the *Enelow-Ettelson* rule is employed principally to permit appeals from "two kinds of orders: (1) orders granting or denying trial by jury; and (2) orders staying or refusing to stay pending actions until issues involved in them are referred to arbitration." 9 *Moore's Federal Practice*, *supra*, at 240. But in numerous other seemingly similar situations the rule has not been applied. For example, an order granting or denying a stay of litigation pending administrative agency action is not appealable under the *Enelow-Ettelson* rule. *Allied Air Freight, Inc. v. Pan American World Airways, Inc.*, 340 F.2d 160, 161 (2d Cir.), *cert. denied*, 381 U.S. 924 (1965). Moreover, when a district court stays an action pending before it to await developments in another action previously commenced involving the same issues, or to compel the parties to bring a separate court action, the *Enelow-Ettelson* rule is inapplicable. See 9 *Moore's Federal Practice*, *supra*, at 251.

In the instant case, the majority disregards the Supreme Court's warnings as well as the prevailing view that the *Enelow-Ettelson* doctrine, itself an analogy, is not to be extended by further analogy. But even if analogical reasoning is proper, the majority inexplicably leaps to the conclusion that this case is "analytically indistinguishable" from a case involving a motion to stay pending arbitration. It is important to remember that the theory behind the *Enelow-Ettelson* doctrine is that the moving party is seeking to have the proceedings at law *held in abeyance* pending resolution of his equitable de-

fense. Abeyance is not sought here because the court is asked to surrender jurisdiction absolutely. Tilghman seeks not to have an equitable defense (such as an arbitration agreement) resolved outside the bankruptcy courts. It requests that the underlying dispute be sent to the English courts for final determination of all claims and defenses. This is a crucial distinction. Moreover, since the contemplated proceedings before the English courts would themselves be in the nature of an action at law, Tilghman's defense is not equitable in nature. *See Anderson v. United States*, 520 F.2d 1027, 1029-30 (5th Cir. 1975); *Wallace v. Norman Industries, Inc.*, 467 F.2d 824, 827 (5th Cir. 1972).

It is true, as the majority indicates, that a decision to defer to a non-arbitral tribunal sometimes will come within the *Enelow-Ettelson* rule. But this is only when the deferring court still retains jurisdiction over the matter pending resolution of an equitable defense. This is not the situation here. Neither the majority nor Tilghman has cited any case in which a court extended the *Enelow-Ettelson* rule to a situation where dismissal was sought on the basis of *forum non conveniens* or a forum selection clause.[4] Thus, in my view section 1292(a) affords no basis for appellate jurisdiction in this case.

2. *Section 1651 and Mandamus*

The majority also relies on 28 U.S.C. §1651 as a basis for interlocutory review in this case. This section

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4. The majority suggests that appellate jurisdiction in the instant case rests on the same basis as appellate jurisdiction in The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), and Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974). This is not correct. Both *Scherk* and *Bremen* involved motions to *stay* the proceedings pending the termination of ongoing proceedings elsewhere, and in both of these cases the district courts had enjoined the defendants from further participation in the proceedings in the other forum. Thus, these cases were appealable under 28 U.S.C. §1292(a) as orders granting injunctions, totally apart from the *Enelow-Ettelson* rule.

gives the courts of appeals discretionary power to issue writs in aid of their potential jurisdiction. I do not disagree with the majority's holding that we can sua sponte invoke our discretionary power under section 1651. But I am not convinced that, under the law of this circuit, this case is appropriate for mandamus.

It is hornbook law that the writ of mandamus is an "extraordinary" remedy "reserved for exceptional circumstances." 9 *Moore's Federal Practice*, *supra*, ¶110.28 at 302. Mandamus is clearly not a substitute for an appeal. *See NLRB v. Interstate Dress Carriers, Inc.*, 610 F.2d 99, 104 (3d Cir. 1979). The general guiding principle is that mandamus is appropriate in cases involving serious abuse of discretion by the district court. *See Eastern Maico Distributors, Inc. v. Maico-Fahrzeugfabrik, G.m.b.H.*, 658 F.2d 944, 951 (3d Cir. 1981).

Our circuit has shown considerable unwillingness to use mandamus to review district court decisions on motions to transfer venue. There is little doubt that mandamus is available in cases where the district court was "patently in error with respect to its power to transfer . . . or simply refused to consider the merits of the transfer request." 9 *Moore's Federal Practice*, *supra*, at 176. But where the district court does consider the merits of the transfer motion, we have held that mandamus is not available to review the contention that the district court abused its discretion. In *All States Freight, Inc. v. Modarelli*, 196 F.2d 1010 (3d Cir. 1952), we explained,

> Every litigant against whom the transfer issue is decided naturally thinks the judge was wrong. It is likely that in some cases an appellate court would think so, too. But the risk of a party being injured either by the granting or refusal of a transfer order is, we think, much less than the certainty of harm through delay and additional expense if these orders are to be subjected to interlocutory review by mandamus.

Id. at 1012. This restrictive view still prevails. *See Wood v. Zapata Corp.*, 482 F.2d 350, 357 (3d Cir. 1973); *Solomon v. Continental American Life Insurance Co.*, 472 F.2d 1043 (3d Cir. 1973). The Supreme Court has also indicated that mandamus is not an appropriate way to review allegations of abuse of discretion. *See Will v. Calvert Fire Insurance Co.*, 437 U.S. 655 (1978); *Parr v. United States*, 351 U.S. 513, 520 (1956).

The instant case falls squarely within the rationale of *All States Freight*. Both the bankruptcy court and the district court examined the factors relevant to the decision whether to dismiss the case on account of the forum selection clause, or on *forum non conveniens* grounds. The issue on appeal is whether these courts made a correct assessment of these factors. This is the kind of judgment that under our cases cannot be reviewed by means of section 1651.

C.

Section 1291 of Title 28 pertains to review of final decisions of the district courts. As noted above, although this provision technically may not be applicable to proceedings in bankruptcy, judicial interpretations of the finality requirement under section 1291 have been applied to section 1293. The majority relies on the so-called collateral order doctrine in finding that the district court's order is final and therefore reviewable under section 1291. I am not convinced that this order possesses the necessary elements of collateral finality to bring it within that doctrine of appealability.

The collateral order doctrine traces its roots to *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). In the broadest sense, *Cohen* established that section 1291 allows appeals from a judgment which is final in effect, even though it may not terminate an action. Recently, in *Coopers & Lybrand v. Livesay*, 437

U.S. 463 (1978), the Court articulated the collateral order doctrine in terms of a three-part test:

> To come within the "small class" of decisions excepted from the final-judgment rule by *Cohen*, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.

Id. at 468. *See also Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 51 U.S.L.W. 4156, 4158 (Feb. 23, 1983); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981); *Yakowicz v. Commonwealth of Pennsylvania*, 683 F.2d 778 (3d Cir. 1982).

The majority holds that although Tilghman's *forum non conveniens* contention does not satisfy the elements of the collateral order doctrine, the request for enforcement of the contractual forum selection clause does fall within the class of orders reviewable under *Cohen*. Our circuit has made clear that the *Cohen* doctrine is to be applied narrowly. *See Rogers v. United States Steel Corp.*, 508 F.2d 152, 159 (3d Cir.), *cert. denied*, 423 U.S. 832 (1975); *Borden Co. v. Sylk*, 410 F.2d 843 (3d Cir. 1969). *See also Yakowicz*, *supra*, 683 F.2d at 783 n.10. We also have stated that each of the three *Coopers* elements is necessary for the doctrine to apply. *Yakowicz*, *supra*, 683 F.2d at 783. A serious question exists whether two of the three *Coopers & Lybrand* factors are satisfied in this case.

First, I am not convinced that the order denying the motion to dismiss on the ground of the forum selection clause resolves "an important issue completely separate from the merits of the action," as *Coopers & Lybrand* requires. It is true, as the majority indicates, that the contractual forum clause establishes a legal right that is analytically distinct from the legal rights at issue in the underlying litigation. But the test of a collateral order is

not whether the various asserted legal rights are related, but whether the same body of facts must be considered in evaluating those legal rights. As the Supreme Court explained in *Coopers & Lybrand*, *supra*, a collateral order is one that not only concerns an issue "completely separate from the merits," 437 U.S. at 468, but does not even "involve[ ] considerations . . . 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Id.* at 469 (quoting *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 558 (1963)). Our own cases have been totally faithful to this view. *See Eastern Maico Distributors v. Maico-Fahrzeugfabrik*, *supra*; *Forsyth v. Kleindienst*, 599 F.2d 1203 (3d Cir. 1979), *cert. denied*, 453 U.S. 913 (1981) (finding the collateral order test satisfied because the question of immunity from suit was totally unconnected with the merits of the action); *Borden Co. v. Sylk*, *supra*.

The majority acknowledges that, in determining whether to enforce a forum selection clause, the court must refer to the merits of the underlying dispute. In order to rule on Tilghman's motion to dismiss, both the bankruptcy court and the district court had to decide whether enforcement of the forum clause would be unreasonable or unjust. This depended on whether trial in the contractual forum would be "so gravely difficult and inconvenient" as effectively to deny Coastal Steel its day in court. *See The Bremen v. Zapata Offshore Co.*, 407 U.S. 1, 18 (1972). This inevitably required the bankruptcy court and the district court to plunge into the merits in order to determine what items of evidence would likely be probative in the case and where that evidence was located, as well as to make judgments concerning the potential hardship to each party of trial in the other's preferred forum. For example, the motion required the court to balance the materiality of the testimony to be given by the witnesses located in England against the materiality of the testimony of witnesses in the United

States.[5] In this regard, the question of whether the forum selection clause should be enforced is identical to the *forum non conveniens* issue: both issues would require us to consider the merits of the underlying dispute in order to identify the practical problems facing the parties in each potential forum.

I also have considerable doubts concerning the majority's treatment of the third *Coopers & Lybrand* factor — whether the order appealed from can be effectively reviewed on appeal from final judgment. The question here is whether "an important right will be lost, probably irreparably, if review must await a final judgment." *Chrysler Corp. v. Fedders Corp.*, 670 F.2d 1316, 1318 n.2 (3d Cir. 1982). The majority appears to disclaim any belief that the forum selection clause confers a type of absolute immunity from being subjected to legal proceedings in an American forum, a right which by nature could only be vindicated before trial. Instead, the majority asserts that unless the district court's ruling on the forum selection clause is reviewed at this juncture, an erroneous and prejudicial decision not to enforce the clause may escape review after final judgment. To reach this result, the majority relies upon an old, obscure statute, 28 U.S.C. §2105 (1976), which provides that the court of appeals may not reverse a district court "for error in ruling upon matters in abatement which do not involve jurisdiction." The majority suggests that we would apply this statute and would refuse to grant relief to Tilghman if it should lose on the merits after being improperly subjected to trial in this country.

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5. Similarly, an inquiry into the merits was essential in order to determine whether an inspection of the blast equipment located in New Jersey would be such a central part of the evidence on the underlying contract claim that it justified disregarding the forum clause of the agreement.

Under the majority's analysis, section 2105 would appear to present a significant restriction on our appellate review of judgments rendered after trial. If so, then one would expect the statute to be the focus of numerous court decisions and much scholarly comment. Yet Professors Wright, Miller, and Cooper — whose treatise is one of the few secondary authorities giving any consideration at all to this statute — describe it quite candidly as "one of the most commonly ignored provisions of the Judicial Code" and say that its "most important feature . . . is certainly its disuse." *See* 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §3903 at 412, 413 (1976). It is sheer speculation for the majority to suggest that we suddenly might seize on this obscure and ambiguous statutory provision to preclude post-trial review of Tilghman's forum selection clause argument.

More important, I am very concerned about the implications of the majority's analysis upon our appellate jurisdiction over orders which are undoubtedly final. Under the majority's reading, section 2105 might preclude from appellate review, on appeal from a final order, a wide range of issues, such as whether the district court should have abstained or deferred to either state, administrative, or private proceedings. *See United States v. Alcon Laboratories*, 636 F.2d 876, 885 (1st Cir. 1981), *cert. denied*, 451 U.S. 1017 (1981). Wright, Miller & Cooper suggest that the reason why section 2105 has been commonly ignored is probably that it runs at odds with modern conceptions of appellate juridiction. *See* C. Wright, A. Miller, & E. Cooper, *supra*. I think it would be extremely short-sighted to elevate this statute from a position of obscurity to a major limitation on appealability merely for the sake of molding the case to fit the collateral order doctrine. In my view, if section

2105 is to be resurrected, it should be done in a case where the issue is directly presented.[6]

II.

I understand fully the laudable reasons that motivate the majority in reaching the merits of this appeal and I share them. We are constrained, however, as a court of law, by statutory and judicial principles that regrettably do not permit us to apply the narrow collateral order doctrine, section 1292(a), or section 1651. But we can exercise appellate jurisdiction in this case on a straightforward basis under the rule of *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964). *Gillespie* established that a court of appeals may review an order which is within the "twilight zone of finality," even though not strictly within 28 U.S.C. §1291, where the circumstances warrant appellate review. Explaining that the finality requirement was to be given a "practical rather than a technical contruction," *id.* at 152 (quoting *Cohen v. Beneficial Industrial Loan Corp., supra*, 337 U.S. at 546), the Court said in *Gillespie* that

> in deciding the question of finality the most important competing considerations are "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." Such competing considerations are shown by the record in the case before us. It is true that the review of this case by the Court of Appeals could be called "piecemeal"; but it does not appear

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6. In addition, it should be pointed out that the majority has implicitly assumed that 28 U.S.C. §2105 applies only to writs of error after a full trial, not to appeals from collateral orders issued prior to trial. There is nothing in the language of the statute, nor in the scant authority on this section, that so limits its application. It would seem to me that if this statute does limit our review of final orders, as the majority suggests, it makes no difference whether the order was final because the case had been fully disposed of or final because it fell under the collateral order doctrine.

> that the inconvenience and cost of trying this case will be greater because the Court of Appeals decided the issues raised instead of compelling the parties to go to trial with them unanswered. . . . And it seems clear now that the case is before us that the eventual costs, as all the parties recognize, will certainly be less if we now pass on the questions presented here rather than send the case back with those issues undecided. . . . We think that the questions presented here are . . . "fundamental to the further conduct of the case."

379 U.S. at 152-54. The rationale of *Gillespie* has been relied upon by the courts of appeals to justify jurisdiction in appropriate cases. *See, e.g., Ingalls Shipbuilding Division v. White*, 681 F.2d 275 (5th Cir. 1982); *United States v. Mississippi Power & Light Co.*, 638 F.2d 899 (5th Cir.), *cert. denied*, 454 U.S. 892 (1981); *Wescott v. Impresas Armadoras, S.A. Panama*, 564 F.2d 875 (9th Cir. 1977).

Admittedly, the power recognized in *Gillespie* is somewhat extraordinary and accordingly should be used sparingly. Nevertheless, because the *Gillespie* rule gives appellate courts much discretion in deciding whether to review district court orders, I believe it furnishes a sound basis for jurisdiction in the instant case. As in *Gillespie*, the order appealed from cannot be fit within the literal terms of section 1291, nor does it seem to possess the necessary features of finality as a collateral order under the *Cohen* doctrine. Yet, as in *Gillespie*, circumstances clearly warrant our review. The questions presented in this appeal are "fundamental to the further conduct of the case" because they concern the appropriateness of an American forum. By reversing the district court on the merits, we rule that the litigation should not go forward in our courts. As we have indicated in another context, "The interest of the fair and prompt administration of justice is better served by ordering this case dismissed immediately, than by refusing to do so in order to dis-

courage piecemeal appeals." *First Jersey Securities, Inc. v. Bergen*, 605 F.2d 690, 702 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980). In light of the reality of the situation, I think the order appealed from is sufficiently within the "twilight zone of finality" to warrant immediate appellate review under *Gillespie*.

Accordingly, on this basis I too would deny Coastal's motion to dismiss the appeal.

III.

I join in parts IV and V of the majority's discussion of the merits of the appeal. I also join in its disposition of the case as set forth in part VI.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 82-5391

COASTAL STEEL CORPORATION, a Corporation of the State of New Jersey,

v.

TILGHMAN WHEELABRATOR LTD. and WHEELABRATOR-FRYE INC.

WheelabratorFrye Inc. and Tilghman Wheelabrator Limited,

Appellants

(D. C. Civil No. 82-412)

On Appeal from the United States District Court of the District of New Jersey—Trenton

Present: Gibbons, Hunter and Rosen, *Circuit Judges.*

This cause came on to be heard on the record from the United States District Court for the District of New Jersey, Trenton and was argued by Counsel February 14, 1983.

Appendix B

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered May 28, 1982, be, and the same is hereby reversed and the cause remanded to the said District Court for the entry of an order, pursuant to Local Rule 47(c)(3), dismissing Coastal's complaint on appropriate conditions with respect to Wheelabrator's appearance in an English Court, and with respect to waiver of any statute of limitations problem. It is further ordered and adjudged that Coastal's motion to dismiss the within appeal, filed September 1, 1982, be and the same is hereby denied. Costs taxed against appellee.

ATTEST

SALLY MEVOS
Clerk

May 17, 1983

APPENDIX C

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

For the Third Circuit

Civil No. 82-5391

COASTAL STEEL CORPORATION, a Corporation of the State of New Jersey,

v.

TILGHMAN WHEELABRATOR LTD. and WHEELABRATOR-FRYE INC.

WheelabratorFrye Inc. and Tilghman Wheelabrator Limited,

Appellants

(D. C. Civil No. 82-412)

SUR PETITION FOR REHEARING

Present: Seitz, *Chief Judge*, Adams, Gibbons, Hunter, Weis, Garth, Higginbotham, Sloviter, Becker and Rosen, *Circuit Judges*.

The petition for rehearing filed by appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other

available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judges Adams and Garth would grant the petition for rehearing.

By the Court,

JOHN J. GIBBONS
Judge

Dated: June 14 1983

APPENDIX D

Oral Opinion of the United States Bankruptcy Court (September 21, 1981)

UNITED STATES BANKRUPTCY COURT

District of New Jersey-Bankruptcy

Docket No. 80-0414

IN THE MATTER OF

COASTAL STEEL CORPORATION

TRANSCRIPT OF PROCEEDINGS

September 21, 1981
United States Courthouse and
Post Office Building, Trenton
New Jersey 08602
Commencing at 10:30 A.M.

Before:

The Honorable Amel Stark

Appearances:

Ravin & Kesselhaut, Esqs.
By: Peter R. Sarasohn, Esq.
Attorney for Debtor in Possession

Appendix D

Riker, Danzig, Scherer & Hyland, Esqs.
By: Douglas S. Eakeley, Esq.
Attorney for Tilghman Wheelabrator, Ltd.
and Wheelabrator-Frye, Inc.

Susan Schaub
Shorthand Reporter of N.J.

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(2)* The Court: We now have Coastal Steel Corporation, a motion by the Debtor to file a reply to a counterclaim out of time. Gentlemen, do you have anything to add to the voluminous briefs that have been filed?

Mr. Sarasohn: No, sir.

Mr. Eakeley: No, your Honor.

The Court: In this matter, the Plaintiff, Coastal Steel Corporation, has filed, first, a motion for permission to file a reply to a counterclaim. And the second motion is for leave to amend its complaint to allege a Tort claim.

Now, as for the motion to permit a reply; to deny this motion is, effectively, to construe the failure to answer the counterclaim as an admission. I believe that the sum involved in the counterclaim is some fifteen thousand odd dollars. Absent any showing of bad faith, undue delay, undue prejudice, or the like, the leave to amend a complaint or a pleading should be freely given in the interest of justice; for to do otherwise is to deny the Plaintiff its right to a day in Court.

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* Figures in parentheses refer to each new page of the stenographic transcript.

This isn't a situation where there has been a demand for admission, or a request for admission and no response, where there has been no response to (3) interrogatories. Interrogatories in this matter were so voluminous that it is almost impossible to decipher either them or the answer.

The policy of liberality appears to be applicable here, since the attorney for the Plaintiff, Coastal Steel Corporation has represented and indicated to the Court that his failure to reply in time was caused by an inadvertence, because of the voluminous pleadings filed in this proceeding. I can well understand the attorney for the Plaintiff missing the very last page of the reply, replying to some ten counts, which, I believe, were in the original complaint.

There is no doubt that the Federal Rule of Liberality in pleadings, as set forth in *Foman* v. *Davis*, 371 U.S. 178 (1962), has been applied in Bankruptcy Court. And the same was held *In re David M. Hunt Construction Company*, 3 E.R. 92 (B.C.E.D. Pa. 1980), an Eastern District of Pennsylvania case, decided in 1980, wherein it stated that it is, "entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions to be avoided on the basis of such mere technicalities." I'm quoting *Foman* at 371 U.S., at Page 181.

I don't want to belabor the point. It would seem to me the Plaintiff's motion to file a reply to (4) Defendant's counterclaim must be granted. And I will grant the motion of the Plaintiff to file an answer to the counterclaim. The Answer will be filed within five days of the entry of the Order.

Now, as to the second: The Plaintiff's second motion seeks leave to amend its original Complaint to include counts sounding in Tort.

Clearly, there are situations in attendant circumstances wherein amendments which change the complexion of the litigation are not permitted. In *Bernstein* v. *N.V. Nederlandsche-Amerikaansche, Etc.*, 79 F.2d 38 (E.D.N.Y. 1948), a Eastern District of New York Case states, "but such strict, harsh construction and application of the Federal Rules of Civil Procedure are the exception to the general rule of liberality in the amendment of pleadings."

The Plaintiff Coastal Steel Corporation may encounter great difficulty in proving negligence or any Tort claim for that matter. But the Plaintiff, Coastal, has, at a minimum, a colorable action in Tort. The Defendant's claim that Coastal's causes of action, presented in its would-be thirteenth and fourteenth courts are, as observed by the quotes as set forth in page seven of Defendant's brief, "absurd on the facts," does not—does not render, I should say, (5) the allegations of those claims legally insufficient.

The second motion of Plaintiff, that is, to amend the Complaint, it seems to the Court, must be granted. The Amended Complaint will be filed within five days after entry of the order.

Now, gentlemen, the next motion is a notice of motion to dismiss the complaint of the Debtor in possession on behalf of the Defendant Tilghman Wheelabrator, Ltd. Again, we've had voluminous briefs, replies, letter memorandum. I understand you request an adjournment at this time?

Mr. Sarasohn: Yes, your Honor, in order to respond to the last memorandum.

The Court: When is this going to end? If you respond, Mr. Eakeley also is going to respond to your response. And you're going to respond to him. And despite the fact that the Court insists that it will not read briefs that are submitted at the last moment, I spent the weekend on this case. I don't think you need an adjournment. I don't think you have to respond to that brief, Mr. Sarasohn. Do you have anything to add?

Mr. Sarasohn: No, I don't, your Honor.

The Court: Actually, gentlemen, the motion to dismiss the complaint is on two basis; first, the (6) Defendant Tilghman Wheelabrator, Ltd., moves for dismissal as to it. Counsel for Tilghman also represents another Defendant, Wheelabrator Frye U.S.A., which is not a party to this motion.

In its brief, Tilghman makes two distinct arguments in support of its motion. First, that Plaintiff Coastal Steel Corporation is bound by the choice of forum provisions of a contract between Tilghman and Sir James Farmer Norton & Co., Ltd., since Coastal claims third-party beneficiary of that contract. The second argument advanced by Tilghman is the argument of forum non-convenience. And this argument apparently is rooted in the contention by Tilghman that the "critical issue" in this matter is not expert testimony, but, rather, "the credibility of English witnesses," as they set forth in their brief.

These witnesses being beyond the effective process of this Court, in considering the Defendant's claim of forum

non-convenience, the Court observes, initially, that the cause of action that is the subject of this motion may properly be in this Court, or an English Court, and that such is the conceptual presupposition of forum non-convenience. This was so held in *Dahl* v. *United Technologies Corporation*, 632 (7) F2d 1027 (3rd Cir. 1980). Convenience for both the litigants and the witnesses is the real issue, since venue and jurisdiction can be had at either here or in England. Both parties have presented persuasive argument in their copious memoranda of law.

It is obvious that where a complex contract claim exists, the place or places where the witnesses would acknowledge the contract, as well as the subject matter of the contract with knowledge, are likely to determine proper venue. The defendant's factual statement, amply supported by exhibits, leads the Court in one direction; the importance of witness credibility available only in England. The Debtor-Plaintiff leads the Court back to the United States with its claim that the situs of the subject matter of the contract, as well as that of important witnesses, should control. It therefore contends that the United States is the proper situs of this action.

The Court has no doubt that—that some inconvenience will be caused regardless of where this case is ultimately heard. That much is apparently unavoidable. I believe that so far there have been taken depositions in England of some ten to 15 witnesses—I don't exactly recall, but I think it was 13 witnesses (8) on the first trip to England.

Coastal Steel commenced the matter here in an American Court of Law. It is apparent that they want it kept here. The difficulty, or even impossibility of enforcing any judgment against a foreign corporation, as the Court

has previously stated, is Coastal's problem. There has been argument raised before me on different occasions that a judgment against the Defendant would not be enforceable, that they would have to go to England anyway. Coastal has argued that that's not before the Court, and that it is still their problem.

Coastal's actions indicate that it is either confident of, or unconcerned about, enforcement at this juncture. The Court should not now, and really should not, interfere with that judgment, with that determination by Coastal. While the sheer volume of the briefs, memoranda, and exhibits filed relating to this motion prohibit a complete point-by-point, case-by-case exposition of the Court's analysis, it appears that a large percentage of the potential admissible evidence is within the United States. The machine is here.

The United States Supreme Court has stated that, "The doctrine of forum non-convenience leaves (9) much to the discretion of the Court, to which the Plaintiff resorts." *Gulf Oil Corporation* v. *Gilbert,* 330 U.S. 501, 508 (1947). The real lesson of *Gilbert,* at least the Court feels that the real lesson of *Gilbert,* is that "The Plaintiff's cause of choice of forum should rarely be disturbed." This is so indicated on Page 508. The Third Circuit in 1980 followed this line of reasoning in *Reyno* v. *Piper Aircraft Company,* 630 F. 2nd 149 (3rd Cir. 1980).

The contract for the purchase of the equipment by the Debtor, Plaintiff, which is the very crux of the instant litigation, was negotiated, entered into, and performed in the United States. The subject matter of the contract, the steel processing plant, is here, as are many witnesses. The rights of Plaintiff may well be seriously jeopardized

if the Plaintiff is required to pursue its cause of action in England. This line of reasoning is followed in *Vanity Fair Mills* v. *Eaton Company*, a Second Circuit case decided in 1956, cited at 234 F.2nd, 633, in which the Supreme Court denied cert. or certification at 352 U.S. 871 (1956). The nexus between the Plaintiff's case and its choice of forum (i.e. the Bankruptcy Court) is sufficient to warrant retention of jurisdiction and venue.

The burden of proof in a motion to dismiss for (10) forum non-convenience is on the moving party. The Court is of the opinion that the Defendant, Movant, Tilghman Wheelabrator, Ltd., has not totally met its burden. Therefore, the Court is constrained to deny the motion to dismiss on the basis of forum non-convenience.

Now, we come to the second argument of the Defendant, Movant, Tilghman Wheelabrator, Ltd. In its motion to dismiss, the Court has considered the merits of Tilghman's contention that a contractual forum selection provision effectively strips this Court of jurisdiction.

In the voluminous briefs and memoranda of law, original, secondary, supplemental, and reply—and if I had granted the motion for adjournment today, there would have been more briefs on top of briefs filed in this case—the Court was dispatched on an exhaustive journey through virtually every applicable case regarding the enforceability of contractual choice of forum clauses.

A myriad of cases, resulting in a variety of holdings, were brought to the Court's attention. All manner and review of authority were employed by opposing Counsel, ranging from prior oral argument before the Court, to hornbook law.

Appendix D

(11) The efforts of Counsel for Coastal Steel and Tilghmen Wheelabrator have afforded the Court the opportunity to study and consider many learned opinions and authoritative commentaries on the subject of forum selection. And the Court has learned quite a lot, as a result of briefs which were submitted, and the research which I've had to do.

But after it's all said and done, the issue then, finally before the Court today is this: Is the choice of forum clause, and in the Tilghman Wheelabrator contract, binding upon Coastal Steel Corporation?

Case law concerning what this Court considers to be the threshold issue of forum selection and provisions is clear. An otherwise valid, enforceable contractual choice of forum clause will be given its full effect, unless a Court of competent jurisdiction exercises its discretion to strike down that clause in the interest of justice.

The often cited *M/S Bremen* v. *Zanata Off-Shore Oil Company*, 407 U.S. 1 (1972) states, "A contractual choice of forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute, or by judicial decision." This (12) is found at page 15.

Congress, under the Bankrupcty Code, has recently expanded the jurisdictional reach of the Bankruptcy Court. Title 28 of the U.S. Code, section 1471, at subsection (c) states that the Bankruptcy Court "shall exercise all of the jurisdiction conferred by this section." Abstention, we note, is limited to those situations where the interest of justice is jeopardized. This is found in section (d) of section 1471.

Appendix D

The jurisdiction conferred by 28 U.S.C. 1471 has been termed "substantially broader than any removal jurisdiction, hitherto known in Federal Jurisprudence." This is so stated in *In re Project Omeco*, 3 B.R. 286, 285 (B.C. Dist. Colo. 1980). There are many cases of Bankruptcy Court abstention in favor of State Court; and they're easy to find. But they do not hold that the Court must abstain. They hold that for reasons best known to the Court, itself, that it may abstain.

Congress, in Section 1471, and the subsequent sections under Title 28, has expressed an intent that the Bankruptcy Court be a "quick Court", effecting expedited recoveries by Creditors, and speedy rehabilitation of Debtors. This is so stated in the (13) *Project Omeco* matter, which I have previously cited.

Subsection (b) of Title 28, section 1471 of the U.S. Code, is the basic jurisdictional grant concerning cases related to bankruptcy. *Collier on Bankruptcy* discusses subsection 6 as, "evincing Congressional intent to bring all the litigation within the umbrella of the Bankruptcy Court." It quotes the House Report, No. 595 of the Ninety-Fifth Congress Session, 1977, at Pages 445 and 446. The Legislative history of the Title 28 U.S. Code 1471 is, in Congress' own words, "intended to leave no doubt as to the scope of the Bankruptcy Court's jurisdiction." Again, at Page 146. One need not to look too hard to find persuasive evidence of the requisite "strong public policy."

The Court could find in reported decisions which would be on the proverbial "all fours." However, the United States Court of Appeals for the Third Circuit has recently upheld a District Court decision which applied a second test for enforceability of contractual choice of

forum clauses, advanced by the United States Supreme Court. The case of *Copperwald Steel Company* v. *Demag-Mannosmann-Boehler,* 347 F. Supp. 53 (W.D. Pa.) (1972) aff.'d 570 F. 2d 953 (3rd Cir. 1978), a Western District of Pennsylvania Case, decided in 1972, and (14) affirmed by the Third Circuit in 1978, deal with the "unreasonable and unjust under the circumstances test" of *Bremen.*

The Court, in *Copperweld,* held that an American purchaser of a casting plant was not bound by a contractual choice of forum clause, despite the fact that the plant was designed in Germany by a German corporation. It was noted by Judge McCune, in *Copperweld,* that witness inconvenience was unavoidable, regardless of the Court's decision, but that since the plant's *performance* was at issue, *and* the plant, itself, was located in the United States, the jurisdiction over the matter would be retained in the United States, due to the "obvious impracticability" of forcing the Plaintiff into a foreign Court.

To summarize, *Bremen* has given two related but alternative tests for determining the enforceability of contractual forum selection clauses.

The Court's decision here today should not, and must not be construed, due to the necessary overlapping and intertwining nature of the Court's discussion of the issues involved; under either the "unreasonable, under the circumstance" test, *or* the "strong public policy of the forum" test, both set forth in *Bremen,* the Court must determine that the interest of justice (15) would not be served by the enforcement of the contractual forum selection clause of the Farmer Norton-Tilghman contract.

While struggling with the complex issues presented by this motion, the Court has ever been mindful of the Su-

preme Court's admonition, in *Bremen,* to avoid adoption of the "provincial attitude" towards sound retention of jurisdiction. But in the final analysis, the Court is persuaded that Tilghman's motion to dismiss, based upon the choice of forum clause, as well as the forum non-convenience agreement, must be denied. An order will be submitted.

Mr. Eakeley: Judge, will the Court entertain a motion to certify the—

The Court: I don't think it's a final order. I don't think it's certifiable.

Mr. Eakeley: I mean, certifiable as an interlocutory order.

The Court: I don't think it's—

Mr. Eakeley: We researched the issue.

The Court: Yes, but I don't think it's an appealable order.

Mr. Sarasohn. Thank you, Judge.

The Court: You'll argue about that?

Mr. Eakeley: Well, with deference, we (16) definitely will consider, further, our situation before—

The Court: In the event that it's determined that either or both of my determinations are appealable, I will reserve the right to write more than a 21-page opinion over the weekend.

Mr. Eakeley: Thank you, your Honor.

APPENDIX E

Opinion of the United States District Court
(January 27, 1982)

UNITED STATES DISTRICT COURT

District of New Jersey

Misc. 81-195

In Re:

COASTAL STEEL CORPORATION, a corporation of the State of New Jersey, et al.,

Debtor

COASTAL STEEL CORPORATION, a corporation of the State of New Jersey,

Plaintiff

vs.

SIR JAMES FARMER NORTON & CO. LTD., et al.,

Defendants

Ackerman, District Judge

This is an application for leave to appeal from an order of the Bankruptcy Court, Judge Stark, dated November 9, 1981, denying the motion of defendant Tilghman Wheelabrator Inc. to dismiss the action brought against it by

the plaintiff-debtor. For the reasons I will set forth below, I am granting defendant leave to appeal.

Plaintiff Coastal Steel Corp., ("Coastal"), filed a complaint against the defendants for alleged breaches of a contract to purchase an in-line steel working plant. Defendant Sir James Farmer Norton & Co. Ltd., ("Norton"), an English company, contracted to sell the plant to Coastal to be located in New Jersey. Norton went into receivership and the receiver has refused to appear in this action. Defendants Charterhouse Japhet Export Finance Ltd., and Charterhouse Group International, Inc., who financed the transaction, have entered into a settlement with the plaintiff. The remaining defendants are Tilghman Wheelabrator Ltd., ("Tilghman"), an English company and Wheelabrator-Frye USA, whose principal place of business is in Indiana. Tilghman is third-tier subsidiary of Wheelabrator-Frye. In connection with the Coastal-Norton contract, Norton entered into a contract with Tilghman to supply a multiple bar stock cleaning and handling system. The supervisory services required under the Norton-Tilghman contract were supplied by Wheelabrator-Frye pursuant to Tilghman's request.

The machine was built, inspected and accepted in England before being shipped to New Jersey. It is alleged that the machine ceased functioning properly in February 1980. Subsequently, Coastal filed a Chapter XI bankruptcy petition and this action followed. In its claims against Tilghman Coastal claims it is a third party beneficiary of the Norton-Tilghman contract. It also has amended its complaint to include a cause of action sounding in tort.

The order of Judge Stark of November 9, 1981, denied Tilghman's motions to dismiss the action under the doc-

trine of *forum non conveniens* or under a forum selection clause in the Norton-Tilghman contract. Judge Stark ruled that the defendant had not satisfied its burden of proving inconvenience sufficient to upset the plaintiff's choice of forum. He stated that some witnesses would be inconvenienced no matter where the action was heard. Noting that defendant contended that issues of credibility of witnesses in England who could not be subpoenaed would be centrally involved in the case, the court was persuaded that the action was properly in a United States court because of the large percentage of potential admissible evidence.

In ruling on the defendant's second argument in favor of dismissal, Judge Stark refused to give full effect to the contractual choice of forum clause. Relying upon the two tests enunciated in *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972), he held that the clause should not be enforced because it would contravene the strong public policy of broad bankruptcy jurisdiction evidenced in the legislative history of 28 U.S.C. §1471 and because the contracted forum was unreasonable under the circumstances.

Defendant Tilghman applies to this court for leave to appeal from this interlocutory order pursuant to Interim Bankruptcy Rule 8004 and 28 U.S.C.A. §1334(b), which is in effect during the transition period under the new Bankruptcy Code. See note preceding 28 U.S.C.A. §1471. Section 1334(b) provides for appeal of an interlocutory order "only by leave of the District Court to which the appeal is taken." While the test of appealability has not been set forth in section 1334(b), it appears that analogy to 28 U.S.C. §1292(b) is appropriate. *See Matter of West Coast Computer Services, Inc.*, 6 B.R. 330

(M.D. Fla. 1980). 1 *Collier on Bankruptcy*, ¶3.03 (1981 ed.).

The standard under 1292(b) imposes three requisites for certification. The order must 1) involve a controlling question of law, 2) offer substantial ground for difference of opinion as to correctness, and 3) if appealed immediately materially advance the ultimate termination of the litigation. *See Katz* v. *Carte Blanche Corp.*, 496 F.2d 747 (3d Cir. 1974) (reargued en banc). While plaintiff argues that issues submitted to the discretion of the bankruptcy judge are not ordinarily certifiable, *citing Standard* v. *Stoll Packing Corp.*, 315 F.2d 626 (3d Cir. 1963), *Katz* is to the contrary. Judge Gibbons' statement for the court is apposite here and worth quoting at length:

> A controlling question of law must encompass at the very least every order which, if erroneous, would be reversible error on final appeal. If the statute were interpreted to exclude any such order that interpretation would be inconsistent with the clear intention of the sponsors to avoid a wasted trial.
>
> • • •
>
> The clear case of a controlling question of law—one which would result in a reversal of a judgment after final hearing—serves to focus upon the limited precedential value of statements about the exercise of discretion appearing in §1292(b) cases dealing with orders granting a change of venue. If an order changes venue to a place where there would be no jurisdiction, no discretion is involved and the certain reversal of the judgment on jurisdictional grounds after trial should be avoided. *See* 28 U.S.C. §1404(a); *cf. Swindell-Dressler Corp.* v.

Dumbauld, supra. If there are two districts, either of which would have jurisdiction, but one of which is in the opinion of the district court superior, it is extremely unlikely that a change of venue would result in a reversal after final judgment. As to most such orders it matters little whether one says that they do not decide a controlling question of law or that their review will not materially advance the litigation. However they are decided the litigation will go forward and a resulting final judgment will not, on the basis of the order, be disturbed on appeal. But a district court could so abuse the discretion vested in it by 28 U.S.C. §1404 (a) as to commit error reversible after final judgment. It could, for example, in a case in which credibility of witnesses was crucial, transfer to a venue in which the critical witness on one side was beyond the reach of a subpoena and available for testimony only by deposition. That would be an exercise of discretion. It might also be a ground for the grant of a new trial after final hearing. Obviously such a result should be preventable by a §1292(b) appeal if the district judge anticipating the problem certified the change of venue order for interlocutory appeal. The key consideration is not whether the order involves the exercise of discretion, but whether it truly implicates the policies favoring interlocutory appeal. The determination of what orders are properly reviewable under §1292(b) must be made by a practical application of those policies, not by a mechanical application of labels such as "discretionary" or "nondiscretionary". Those policies, both before and since the enactment of §1292(b) have included the avoidance

> of harm to a party pendente lite from a possibly erroneous interlocutory order and the avoidance of possibly wasted trial time and litigation expense.

496 F. 2d at 755-56.

In this case, the order does implicate the policies favoring interlocutory appeal. Plaintiff argues that the case essentially involves expert testimony, but defendant claims that the credibility of English witnesses who were involved in the building, inspecting, and approving of the machine may be at issue. The prejudice from this possibly erroneous order is clear as is the expense and time which may be wasted if the order is reversed after a lengthy trial in this country. Also, because it appears to be a matter of first impression, there is substantial ground for difference of opinion whether the clause in the contract selecting a forum should be enforced against Coastal or whether there is strong public policy against its enforcement in the jurisdictional provisions of the bankruptcy court.

For these reasons, I will grant leave to defendant Tilghman to appeal from Judge Stark's denial of its motions. Argument will be scheduled for the February 19, 1982 motion day in this court. Briefs should be submitted, according to the rules, ten (10) days before the motion day.

An order in conformance with this opinion has been filed by the court.

Dated: January 27, 1982.

APPENDIX F

Oral Opinion of the United States District Court
(May 3, 1982)

UNITED STATES DISTRICT COURT

District of New Jersey

Civil No. 82-412

COASTAL STEEL CORPORATION

vs.

TILGHMAN WHEELABRATOR, LTD. and
WHEELABRATOR-FRYE, INC.

May 3, 1982
Trenton, New Jersey

Before:

The Honorable Harold A. Ackerman, U.S.D.J.

Appearances:

Ravin & Kisselhaut,
By: Peter R. Sarasohn, Esq.
For Coastal Steel Corporation

Riker, Danzig, Scherer & Hyland
By: Douglas S. Eakeley, Esq.
For Tilghman Wheelabrator, Ltd. and
Wheelabrator-Frye, Inc.

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(2)* The Court: I want to say this at the outset, because I think if one reads appellant's first brief, one might draw the conclusion that appellant was critical of Judge Stark for reading his opinion. He came out and read his opinion. I think that is a fair statement to make.

I announced to the parties that I was prepared to rule this morning. I made that very, very clear. I have listened to the arguments, and I must say to counsel that I haven't changed my mind, but I has listened to you and I want to be absolutely up-front with you.

If you were here earlier on a previous motion, I don't know if you were here or not, the attorney did change my mind, so I would like to think that I am not totally inflexible.

This is an appeal from an order of the Bankruptcy Court, Judge Stark presiding, dated November 9, 1981, denying the motion of defendant Tilghman Wheelabrator, Inc. (Tilghman) to dismiss the action.

On January 27, 1982, I granted the defendant leave to appeal this interlocutory order. That grant was based principally on the fact that even though the Judge's order involved an exercise of discretion, an interlocutory review might avoid a perhaps unnecessary lengthy and expensive trial. *See Katz* v. *Carte Blanche Corporation*, 496 F.2d 747, 755-56 (3d Cir. 1974). It was reargued, I might say, *en* (3) *banc.*

For the reasons I will set forth, I am affirming the Bankruptcy Court's order.

The facts relevant to this appeal show the following: the plaintiff, Coastal Steel Corporation (Coastal) is the

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Bankruptcy Court has jurisdiction over this action under 28 U.S.C. § 1471(b) as a civil proceeding "arising in or related to cases under Title XI." Specifically, this is a suit filed against various defendants for damages allegedly due the plaintiff under contractual and tort theories of recovery.

Plaintiff is the successor in interest to Jersey Cold Drawn Steel Corporation (JCD). It is a New Jersey corporation which fabricates steel wire.

On November 9, 1976, JCD entered into a contract with defendant Sir James Farmer Norton, an English company, for an "in-line steel working plant in turn-key condition ready for commercial production."

The plant was to be established on the New Jersey premises of JCD. In connection with the JCD-Norton contract, Norton subcontracted with defendant Tilghman for a multiple bar stock cleaning and handling system. At Tilghman's request, defendant Wheelabrator-Frye, Inc. (Wheelabrator) was to "commission" in New Jersey the machine provided by (4) Tilghman.

Tilghman is an English company and a third-tier subsidiary of Wheelabrator.

Wheelabrator is an American company with its principal place of business in Indiana and an office in New Jersey.

The other defendants named in the complaint were Charterhouse Group International, Inc., who financed the transaction. These companies, both of which are English, have entered into a settlement with the plaintiff.

Defendant Norton has gone into receivership and the receiver has refused to appear in this action.

The only remaining defendants, therefore, are Tilghman and Wheelabrator.

The order of Judge Stark denied Tilghman's motion to dismiss on two proffered grounds: the doctrine of *forum non conveniens* and the enforcement of a forum selection clause in the Norton-Tilghman subcontract mandating that the action be tried in an English court of law.

Judge Stark ruled, as I summarized in my January opinion, that the defendant had not satisfied its burden of proving inconvenience sufficient to upset the plaintiff's choice of forum. There would be inconvenience to some witnesses no matter which side of the ocean the action was heard.

(5) Noting that the defendant contended that the credibility of unavailable English witnesses would be centrally involved in the case, the Court was persuaded that venue was proper in the United States because of a large percentage of potential admissible evidence.

On the issue of the effect of the forum selection clause, Judge Stark held the clause to be unenforceable under either of the tests enunciated in *M/S Bremen* v. *Zapata Off-Shore Company,* 407 U.S. 1 (1972). He found that enforcement of the clause in the Norton-Tilghman subcontract would contravene the strong public policy of broad bankruptcy jurisdiction evidenced in the legislative history of 28 U.S.C. § 1471 and that it would be unreasonable under the circumstances.

Before I discuss the merits of this appeal, there is a procedural matter to be taken care of. By motion filed on short notice, which I might emphasize was by permission of this Court, that plaintiff has sought clarifi-

cation of exactly which party is before the Court on this appeal. The plaintiff argues that only Tilghman moved to dismiss the complaint in the Bankruptcy Court, that the order of Judge Stark was only as to Tilghman, and that my certification of this appeal was correspondingly limited in application to Tilghman.

Wheelabrator, on the other hand, argues that it is represented by the same counsel as Tilghman, that it (6) explicitly joined in the dismissal motion in the papers in support of the motion, and that it preserved its objections to the from of the November 9th order. I am not persuaded by defendant's protestations.

I was aware of the difference of opinion on this matter when I ruled on the certification, and quite consciously restricted my order to defendant Tilghman. The order being appealed from is limited in application to defendant Tilghman. Defendant Wheelabrator, therefore, has nothing to appeal from. Also I do not find that Judge Stark erred in refusing to accept the informal method of notification of joinder put forward by defendant's counsel. *See* Federal Rule of Civil Procedure 7.

I note that that rule applicable to adversary proceedings is applicable to adversary proceedings in bankruptcy. Proposed Rule 2007 allows for oral motions only in certain circumstances.

An example of a permissible oral motion is one to strike evidence or for a directed verdict during a trial. But argument on a motion does not constitute a trial or hearing for purposes of this rule. *See Shapiro* v. *Freeman*, 38 FRD 308 (S.D. N.Y. 1965).

Furthermore, as I am affirming the decision of the Bankruptcy Court, defendant Wheelabrator is not really prejudiced.

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(7) The standard of review on this appeal is whether the Bankruptcy Court abused its discretion in finding it proper to maintain the action in the defendant's chosen forum. *See In re Pigott,* No. 81-2044 (March 23, 1982 3d Cir.). As the forum selection clause issue invokes a written agreement, I shall consider it before reaching the equitable doctrine of *forum non conveniens.*

Appellant argues that the complaint presents a single cluster of operative allegations centering on the Norton-Tilghman subcontract for a blast cleaning machine to which appellee may, at best, be a third-party beneficiary.

Most generously viewed, the claims are contractual and cannot be styled in tort. Furthermore, appellee is bound by the forum selection clause because it is neither violative of a public policy nor unreasonable under all the circumstances. Appellee entered the international market when it purchased an English turn-key plant and it should not now be allowed to hide behind provincial skirts.

Appellee does not dispute that some of its causes of action rely upon the contractual agreement between Tilghman and Norton. However, the non-contractual claims are not subject to the terms of the forum selection clause. These include claims for strict design liability, negligent design, manufacture, installation and repair, fraudulent (8) representation, and tortious interference.

The remaining claims sound in breach of contract in express and implied warranties. Under these circumstances, and when supplemented by the facts of appellee's bankruptcy and its less direct connection to the subcontract, the Judge's decision below was not incorrect.

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Appellant is correct in its statement that forum selection clauses do not "oust jurisdiction" and are now, as a general rule, held enforceable. *See Bremen* cited *supra* at page 12.

In *Bremen,* the Court stated that a "more hospitable attitude toward forum-selection clauses . . . accords with ancient concepts of freedom of contract and reflects an appreciation of the expanding horizons of American contractors who seek business in all parts of the world." *See* pages 10 and 11 of that opinion.

The burden of showing serious inconvenience is on the party to the contract who is seeking to avoid its terms. An alternative basis for avoiding a forum selection clause is if it is contrary to strong public policy.

Judge Stark held that the clause in the Norton-Tilghman contract was unenforceable under either of these two tests.

I find on this appeal that he did not abuse his discretion in finding an English forum unreasonable and (9) unjust under the circumstances. I will not reach, therefore, the question of public policy as evinced in the Bankruptcy Court's grant of jurisdiction.

I note at the outset that appellant has the burden of persuading me that Judge Stark abused his discretion. It is not enough for me to find that I might have decided the matter differently had it been before me in the first place.

The facts in the record which support the decision below are:

(1) Appellee's status vis-a-vis the contractual claims as third-party beneficiary.

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As I pointed out during the colloquy, neither party has presented a case where a third-party beneficiary was held to be bound by a forum selection clause. In *Republic International Corporation* v. *Amco Engineering Company*, 516 F.2d 161 (9th Cir. 1975), cited by appellant, the party seeking to avoid a forum selection term had bound itself to the main contract under a contract of assignment. *See also St. Paul Fire & Marine Insurance Company* v. *Traveler's Indemnity Company*, 401 F.Supp. 927 (D. Mass. 1975).

Although a third-party beneficiary's rights are "measured by the terms of the contract between the promisor and the promisee" *see Roehre* v. *Lees*, 178 N.J. Super. 399, 409 (App. Div. 1981), the rationale for enforcing a forum selection clause in *Bremen* is to leave the parties to their (10) bargain. I need not decide whether a third-party beneficiary takes subject only to the substantive, as opposed to procedural, terms of the contract.

I agree with the appellee that its status, at the least, takes some of the force out of the forum selection clause.

The second factor supporting the decision below, the non-contractual causes of action alleged in the complaint.

Appellee sought and was granted leave to amend its complaint to assert tort claims against the two remaining defendants. Appellant argues, in effect, that these allegations would quickly fall under a Rule 56 ax and should not spoil enforcement of the forum selection clause, citing *Paterson, Zochonis Ltd.* v. *Compania United Arrow, S.A.*, 493 F.Supp. 621 (S.D. N.Y. 1980). I am not persuaded by its argument.

First, no motion to dismiss under Rule 12(b)(6) or motion for summary judgment has been made and heard.

Second, in its present posture, the complaint's non-contractual claims are clearly colorable.

In fact, as Norton has not appeared in this action, it is at least arguable, though I am not passing on the merits of either side, that the tort claims against the manufacturer and servicing agent of the blast cleaning component would become more viable and that the contractual (11) claims would be subsumed thereunder. Theories premised on third-party beneficiary, or implied warranties of fitness or merchantability, have become "nearly synonymous" in this forum with strict liability. *See, e.g., Collins* v. *Uniroyal,* 64 N.J. 260, 271 (1974); *Santor* v. *A&M Karagheusian,* 44 N.J. 52 (1965). At least one court has extended the *Santor* holding to a commercial claimant even though neither privity nor personal injury was present. *See Monsanto* v. *Alden Leeds,* 130 N.J. Super., page 257, decided by the Law Division in New Jersey in 1974.

The tort claims in this action are at least as colorable as the contractual claims and the contracts with this forum to those claims are substantial. In *Paterson* cited *supra,* there were no contacts with the forum to either the contractual or non-contractual claims. As it is unreasonable to force the appellee to litigate what the appellant has labeled a "single cluster of operative allegations" in two forums, this factor substantially supports Judge Stark's ruling.

(3) The presence of an American corporation in this litigation which has not contractually preselected a forum for these claims.

In addition to the impact of the joinder of contractual and non-contractual claims, the joinder of Tilghman and

Wheelabrator makes the enforcement of this forum (12) selection clause unreasonable and unjust. Only one of the defendants was a party to the subcontract agreement. Only one of the defendants is present on this appeal today.

These are just three of the reasons why I cannot find that the Bankruptcy Judge abused his discretion in finding enforcement of this contractual clause unreasonable under the circumstances. *See Bremen*, cited *supra*, *Copperweld Steel Company* v. *Demag-Mannesmann-Bohler*, 578 F.2d 953 (3d Cir. 1978).

Judge Stark also found significant the interests of the creditors under Coastal Steel's reorganization plan to a speed resolution of this matter, and the large amount of potential evidence to be found in this country. He also considered witness inconvenience, although he referred to it explicitly on the consideration of the alternative ground to Tilghman's motion.

Nor did the Judge below abuse his discretion in refusing to dismiss the action under the doctrine of *forum non conveniens*.

On that issue the decision of the trial judge is entitled to great deference. *See Piper Aircraft Company* v. *Reyno*, slip opinion at page 20, decided by the United States Supreme Court on December 8, 1981, and the burden was on the appellant initially and it is still on it on this appeal.

Here, the factors already outlined which I have (13) held support the Judge's finding of serious inconvenience sufficient to avoid the forum selection clause, also support the Judge's balancing of the private and public interest factors in favor of the plaintiff's choice of forum. *See Gulf Oil Corporation* v. *Gilbert*, 330 U.S. 501 (1947).

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Finding no clear abuse of discretion in Judge Stark's rulings on either prong of appellant's attack on the venue of this action, I shall affirm these rulings, and I will ask you, Mr. Sarasohn, to draw an appropriate order in conformance with my ruling, and I appreciate very much your hearing me into the lunch hour.

Mr. Sarasohn: Thank you very much, your Honor.

The Court: Good afternoon.

Mr. Eakeley: Good afternoon.

Will you entertain at least a limited application to certify one question?

The Court: Under 1292(b)?

Mr. Eakeley: Yes.

The Court: Make a motion. Not now. Make a motion.

Mr. Eakeley: No, we have already burdened the Court.

The Court: If you meet the standards laid down in *Katz* v. *Carte Blanche,* be my guest.

APPENDIX G

Oral Opinion of the United States District Court (June 21, 1982)

UNITED STATES DISTRICT COURT

District of New Jersey

Civil No. 82-412

COASTAL STEEL CORPORATION, etc.,

Plaintiff,

vs.

TILGHMAN WHEELABRATOR, LTD., et al.,

Defendant.

June 21, 1982
Trenton, New Jersey

Before:

The Honorable Harold A. Ackerman, U.S.D.J.

Appearances:

Ravin & Kisselhaut
By: Peter Sarasohn, Esq.
For Plaintiff

Riker, Danzig, Scherer & Hyland
By: Charles Danzig, Esq.
For Defendants

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(15)* In the guise of a motion to dismiss under *forum non conveniens,* or forum selection clause, what we really have is a motion for summary judgment, because in this case the relief they are seeking is not change of venue, but dismissal.

The Court: Actually, that is what you said the last time we were here.

Sarasohn: Yes, your Honor.

The Court: I don't mean to burden you with that thought, but there is a virtue in consistency.

Mr. Sarasohn: I appreciate that, your Honor, but when I listen to my colleague, and I say that with great deference, across the table, Mr. Danzig, I hear some of the same arguments that were made before.

The Court: But he wasn't here before. I mean, they brought in fresh blood, so to speak.

Mr. Sarasohn: Your Honor, I will, I think I have said enough. I think Mr. Danzig and I both agree for the first time between our firms that you are conversant with all the facts and all the law, and we will rely on your Honor's good judgment.

The Court: Thank you.

This case is on appeal from an interlocutory order of the Bankruptcy Court, Judge Stark sitting, dated November 9, (16) 1981, denying the motion of defendant Tilghman Wheelabrator Ltd. (Tilghman) to dismiss the action against it on the basis of *forum non conveniens,*

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* Figures in parentheses refer to each new page of the stenographic transcript.

and a forum-selection clause in a contract providing for a forum in England.

On January 27, 1982, I granted leave to Tilghman to appeal the order to this Court, and by order dated May 28, 1982, I affirmed the Bankruptcy Court.

The case is before me today on Tilghman's application for certification to the Third Circuit pursuant to 28 U.S.C. § 1292(b) and for a stay pending appeal.

Plaintiff appellee, Coastal Steel Corporation (Coastal), raises several arguments contesting the availability of § 1292(b) certification in this case. In particular Coastal argues that under the Bankruptcy Reform Act of 1978, the Third Circuit only has jurisdiction of appeals from final orders in bankruptcy matters.

Coastal also argues that the original order of the Bankruptcy Court was not appealable even to the District Court because it was a non-reviewable decision, not to abstain from exercising its jurisdiction pursuant to 28 U.S.C. §1471(d). While these are interesting analytical issues and both parties have done excellent jobs of briefing them, I need not decide them because I have determined that certification under § 1292(b) is not appropriate in this case.

The standards governing the certification of (17) interlocutory appeals pursuant to § 1292(b) were set forth in *Katz* v. *Carte Blanche Corporation*, 496 F.2d 747 (3d Cir.) (*en banc*) *cert. den.* 419 U.S. 885 (1974). According to *Katz*:

> "The statute imposes three criteria for the district court's exercise of discretion to grant a § 1292 (b) certificate. The order must involve a 'control-

> ling issue of law', (2) offer 'substantial ground for difference of opinion' as to its correctness and (3) if appealed immediately 'materially advance the ultimate termination of the litigation.'" See page 754 of that opinion.

The Third Circuit has also emphasized that the statute should "be sparingly applied . . . and used only in exceptional cases where an intermediate appeal may avoid protracted and expensive litigation. . . ." *See Milbert* v. *Bison Laboratories,* 260 F.2d 431, 433 (3d Cir. 1958) (*en banc.*)

In this case, the first criterion is obviously met. The order appealed from involves a choice of forum question. The law controlling the case will depend on whether the case is tried in England or in New Jersey. However, all three of the statutory criteria must be met before an order may be certified. In my judgment, neither the second nor third are met by this order.

I do not find that there is "substantial ground for a difference opinion" as to the correctness of my order (18) affirming the Bankruptcy Court. Both parties agree that the correct standard of review of the Bankruptcy Court's order is abuse of discretion. I determined after a careful review of the voluminous record that the Bankruptcy Court had considered the proper factors for assessing defendant's motion to dismiss on *forum non conveniens* and a forum selection clause grounds.

If the proper factors are considered and there is support in the record, the trial judge's exercise of discretion deserves substantial deference. *See Piper Aircraft Company* v. *Reyno,* 50 LW 4055, 4061 (Dec. 8, 1981).

In my judgment, I applied the correct standard of review.

Defendant argues that both the Bankruptcy Judge and I suffered from the same misperception of the law in determining what factors should be considered. Apparently, since defendant does not share this view of the law, defendant contends that there is substantial ground for difference of opinion. Not facetiously I state that it has been my experience that losing parties rarely agree with the judge's view of the law. That disagreement does not, however, satisfy the second criterion, nor is the third criterion met, in my judgment.

Further appeal in my judgment would only serve to prolong the litigation. It would not materially advance it.

(19) While defendant raises the specter of a possible wasted trial, if both the Bankruptcy Judge and I were wrong, I find it a very faint specter. Even if it were determined after final judgment that Judge Stark had erred in denying defendant's motion for dismissal, it is highly unlikely that that error would result in a reversal.

The issue boils down to a choice between two forums, both with jurisdiction. For reversal, the judge's determination of New Jersey as the appropriate forum would have to prejudice defendant's ability to obtain a fair trial. *See Katz, supra,* at 755-56.

The record developed thus far does not indicate such a likelihood. Accordingly, I find that the last criterion is not satisfied.

Defendant further argues that because I certified this case once, using a 1292(b) criterion, by analogy, I should

ipso facto certify it again. This argument is unpersuasive. When I first considered whether to allow an interlocutory appeal to my court, I did not have the benefit of the voluminous record subsequently presented for my edification. Moreover, the United States Supreme Court had decided in *Piper Aircraft*, cited *supra*, after Judge Stark's decision and I thought it might affect the legal basis of his decision. In short, I made the original decision to certify from a different perspective than I now enjoy.

(20) Mahatma Gandhi was once asked, as his biographer reports, why he advocated the abolition of the British Colonial Empire in 1932 when he had taken a different position in 1928. Gandhi replied, according to his biographer, that when he examined the facts in 1928 he arrived at certain truths, and in 1932, when he examined the facts, he arrived at certain truths. He was not being inconsistent, he observed. He was merely proceeding from truth to truth.

I would like to think that I may afford myself that luxury in the context of these circumstances.

As explained above, I find that the second and third criteria for § 1292(b) certification are not met. Accordingly, I will deny defendant's motion for certification.

My determination on this issue moots defendant's application for a stay pending appeal.

Mr. Sarasohn, may I impose upon you to prepare an order in conformance with my determination here today.

Mr. Sarasohn: I will, your Honor.

The Court: Thank you.

APPENDIX H

Statutory Appendix

Title 28, United States Code:

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

§ 1292. Interlocutory decisions.

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

• • •

Appendix H

§ 1293. Bankruptcy appeals

(b) Notwithstanding section 1482 of this title, a court of appeals shall have jurisdiction of an appeal from a final judgment, order, or decree of an appellate panel created under section 160 or a District court of the United States or from a final judgment, order, or decree of a bankruptcy court of the United States if the parties to such appeal agree to a direct appeal to the court of appeals.

§ 1471. Jurisdiction

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.

(c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.

(d) Subsection (b) or (c) of this section does not prevent a district court or a bankruptcy court, in the interest of justice, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11. Such abstention, or a decision not to abstain, is not reviewable by appeal or otherwise.

(e) The bankruptcy court in which a case under title 11 is commenced shall have exclusive juris-

diction of all of the property, wherever located, of the debtor, as of the commencement of such case.

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

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§ 2105. Scope of review; abatement

There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction.